Asian Journal of Law and Society (2023), **10,** 204–218
doi:10.1017/als.2021.34

RESEARCH ARTICLE

Monetizing Legal Assets: Social and Economic Benefits of Third-Party Dispute Finance in Asia

Cheng-Yee Khong

Omni Bridgeway
E-mail: ckhong@omnibridgeway.com

Abstract

This article explains third-party dispute finance, including practical issues relating to the funding process and how to choose a funder. It examines some of the social benefits of funding and its importance in an economic downturn, and looks at some of the risks of dispute finance. It also considers the regulation of dispute finance in various Asian jurisdictions, as well as recent industry trends, including the use of dispute funding by well-resourced corporates and dispute-finance products for companies. It explains funding for insolvency-related claims and funding for the enforcement of awards and judgments. Finally, it provides two case-studies in which funding provided access to justice and enabled the funded party to recover a non-performing loan in multiple jurisdictions.

Keywords: dispute finance; third-party funding; arbitration funding; litigation funding

1. Introduction

The full economic impact of the COVID-19 pandemic in Asia and across the globe is likely to be uncertain for some time. According to a report from the International Monetary Fund in April 2021, economic recoveries across countries and sectors are diverging, depending on the extent of pandemic-induced disruptions and policy support from governments.[1] The outlook depends not only on "the battle between the virus and vaccines," but also on how effectively economic policies can limit lasting damage from the crisis.[2]

Businesses in all regions and in most sectors have been affected. They have faced—or continue to face—challenges and pressures from many different areas, including new legislative and regulatory requirements, liquidity and supply issues leading to delays or inability to conduct operations, and difficulties in the performance of contractual obligations. Governments responded by launching a range of legal, financial, and regulatory measures aimed at providing temporary relief, such as the adoption of a moratorium against legal actions and termination of contracts, a relaxation of liability for wrongful trading, suspension or restriction of creditors' rights to initiate insolvency proceedings, and suspension of directors' duties to initiate insolvency proceedings.

Amidst this continuing uncertainty, many businesses will need to conserve cash and consider new ways to access liquidity. Third-party dispute finance is one potential source of liquidity. In addition to economic benefits, dispute funding also provides considerable social benefits by providing access to justice to parties who may otherwise lack the means to pursue their claims.

[1] International Monetary Fund (2021), p. 1.
[2] *Ibid.*

This article explains how dispute finance works; the regulation of dispute funding in various Asian jurisdictions; some of the social benefits of funding and its importance in an economic downturn; some risks associated with dispute finance; and some recent industry trends, including the use of dispute funding by well-resourced corporates. It also considers the range of dispute-finance products for companies, and funding for the enforcement of awards and judgments. Finally, it provides two case-studies in which funding provided access to justice and enabled the funded party to recover a non-performing loan in multiple jurisdictions, and considers briefly some practical issues relating to funding, including how to choose a funder and the funding process.

2. Growth of third-party dispute finance

Third-party funding of disputes was pioneered in modern times in Australia during the 1990s. The funding of claims by liquidators and trustees in bankruptcy under their statutory powers to sell assets (including claims) was a recognized exception to the ancient rules of maintenance and champerty that had prohibited a "stranger" participating in litigation for profit in many common-law jurisdictions.[3] Following supportive court decisions,[4] dispute funding then expanded into a variety of civil claims, including general commercial litigation, and spread to the UK, Europe, and North America. In recent years, third-party funding of international disputes has grown rapidly and is becoming a mainstream financial product around the globe. It is now also available in many jurisdictions in Asia, in particular to finance international arbitration claims.[5]

The use of dispute funding for international arbitration was said to be due to the growth in the use, cost, and complexity of international arbitration, as well as increasing demands on arbitration parties and their lawyers to manage the associated costs and risks.[6] Parties may require finance for a number of reasons: to meet at times substantial up-front payments required by arbitral institutions to cover institutional and arbitrator fees, to level the playing field against a better-resourced opponent, and/or to manage internal legal budgets whilst pursuing claims and asserting market positions.

The supply of dispute finance is also on the rise as investors seek meaningful returns from investments that are not directly correlated with volatile financial markets.[7] The dispute-finance market has seen a number of new entrants and established funders are continuing to raise additional capital for investment.

[3] The doctrines of maintenance and champerty date back to at least the thirteenth century and have remained essentially unchanged throughout the centuries. Maintenance involves a person's "officious intermeddling" in litigation in which he has no legitimate interest. Champerty is a particular kind of maintenance and involves a person taking a share of the proceeds of the litigation maintained.

[4] In 2006, Australia's highest court, the High Court of Australia, held by a majority that it was not contrary to public policy for a litigation funder to finance and control litigation in the expectation of profit (*Campbells Cash & Carry Pty Ltd v. Fostif Pty Limited* [2006] H.C.A. 41).

[5] *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, April 2018 (International Council for Commercial Arbitration) (hereinafter ICCA TPF Report), p. 18.

[6] *Ibid*. See also the 2015 International Arbitration Survey: *Improvements and Innovations in International Arbitration*, conducted by Queen Mary University of London and White Case LLP, in which 68% of participants cited "*cost*" as the "*worst characteristic of arbitration*." The cost of international arbitration is often compounded by the international nature of the dispute, requiring multi-jurisdictional and often specialist legal teams, as well as institutional fees, arbitrator costs, and hearing-related expenses.

[7] Sahani & Nieuwveld (2012), p. 12.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

3. What is dispute funding?

In general, dispute funding involves an otherwise unrelated party agreeing to pay some or all of a party's costs associated with an arbitration or litigation (including lawyer and expert fees, arbitration fees, or court costs). In return, the funder receives a share of any sum recovered from the successful resolution of the claim (also referred to as the proceeds). This may occur due to the settlement of the claim, arbitral award, or a court judgment. Some funders will also agree to pay any security for costs and any adverse costs (where applicable) that the funded party is ordered to pay.

Unlike traditional forms of finance, dispute funding is typically non-recourse. This means that the funder only recovers its costs and receives a return on its investment if a successful recovery is made. If the case is lost, or if no recovery is received from the dispute, the funder receives nothing—that is, no repayment is required of any of the funded costs of the claim. Therefore, the risks of pursuing the claim are transferred to the funder.

4. Practical aspects of funding

4.1 Funding process

The process of applying for third-party funding is straightforward. Usually a claimant, or the claimant's lawyer, approaches a funder by phone, e-mail, or in person.

4.1.1 Preliminary discussions

A confidentiality agreement should be executed early in the process, to protect confidentiality and privilege over any information and documents provided to the funder.

The funder will ask for information including the identity of the parties, the nature and size of the claim, a copy of any legal advice, any likely defences, and the amount of funding sought (i.e. the likely costs of pursuing the arbitration or litigation to resolution). This will enable the funder to form a preliminary view on the case quickly and decide whether to offer funding terms.

4.1.2 Commercial terms and further due diligence

An experienced funder will be able to provide indicative commercial terms or decline to fund based on an initial assessment of the claim. If indicative terms are offered, they may be recorded in a term sheet or in the form of a conditional funding offer.

When the funder considers that it is likely to require significant time or expense on further due diligence, it may ask for an exclusivity period in which to carry out its assessment. The time needed will depend on the complexity of the claim and the resources available to the funder. Some funders conduct due diligence "in-house," relying on the skills and experience of their investment staff who are often experienced former dispute lawyers. Other funders conduct all their due diligence by retaining external counsel.

4.1.3 Approval process

The final decision to offer to fund a case is often taken by an investment committee or the funder's board of directors, on a recommendation from an investment manager or case-assessment team. Often a funder's investment committee comprises senior management, and some also include former judges and experienced arbitrators.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

4.1.4 Funding agreement

If an offer to fund the case is made and accepted, a funding agreement is then negotiated with the claimant. The funding agreement contains the financial terms on which the funder agrees to fund the claim, as well as the parties' other rights and responsibilities in relation to the claim, such as the rights of termination in relation to the funding agreement. If permitted by the applicable law, the funded claimant's lawyer may be a party to the funding agreement and the lawyer's retainer may be contained in, or annexed to, the funding agreement. The lawyer's retainer must be consistent with the lawyer's professional conduct obligations.

Key terms in a funding agreement include those relating to confidentiality and the provision of documents to the funder, the funder's liability to provide any security for costs or adverse costs (where applicable), managing conflicts of interest, and the parties' respective rights of termination.

4.2 Investment criteria

The decision to fund a case is an investment decision. Therefore, funders seek to fund cases that have a high degree of certainty, both as to the legal merits of the case and the recoverability of damages. A funder will carefully and thoroughly analyze all aspects of a potential case that bear on the financial risks that it is being asked to assume or share.

The investment criteria may vary between different funders. However, they will usually include the following.

4.2.1 The merits or prospects of success

The degree of merit required by a funder to fund a claim is highly subjective. Greater weight will be given to claims that are based on documentary evidence and clear points of law, which are more predictable. Claims that rely on witness evidence or contested facts are likely to be more risky and less suitable for funding.

4.2.2 The "economics" of the investment

The funder will try to ensure that the estimated costs and risks of pursuing the claim are not disproportionate to the estimated monetary value of the claim or likely recovery. The funder will usually require the lawyers to prepare a detailed budget that includes the estimated legal and other costs, such as arbitrator and institutional costs or court fees, expert fees, any travel expenses, and other disbursements. The funder will also consider the estimated amount of any adverse costs orders (where applicable) if the claims are lost.

Reputable funders will often seek to fund claims in which the economics permit the funded party to retain more than half of the award, judgment, or resolution sum. For this reason, funders often require a minimum ratio between the likely resolution sum and costs of investment.[8]

4.2.3 The prospects of recoverability

The funder will investigate whether there is a high prospect of recovery.[9] The respondent must appear to have the ability to meet any settlement reached, or award or judgment made against it, or whether there are any risks associated with the enforcement of an award or judgment.

[8] ICCA TPF Report, pp. 25–6.
[9] *Ibid.*, p. 25.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

4.3 How to choose a funder

Before choosing a funder, lawyers and their clients should do careful due diligence on any funders that they approach. Important factors to consider include:

- the funder's reputation, its track record (including how many claims it has funded, the size of those claims, and what were the results), and the skills, experience, and competence of its staff;
- the funder's financial capacity and the transparency of its business structure (e.g. whether it is a public company with traded share capital that is required to publicly disclose its financial position, private company or private fund, etc.); it is particularly important to be satisfied that the funder has sufficient capital and insurance, where applicable, to meet its obligations under the funding arrangement; this may include checking that the funder has adequate financial resources to pay both the claimant's costs and any adverse costs order that it has agreed to cover (if applicable);
- the terms of the proposed funding arrangement: what the funder is promising to fund and whether those terms clear, understood, and appropriate for the claimant, having regard to its particular circumstances and requirements.

5. Case-studies

5.1 Access to justice for flood victims in Australia

5.1.1 The situation

Through December 2010 and January 2011, the state of Queensland in Australia experienced record levels of rainfall, culminating in major flooding on 13 January 2011 throughout most of the Brisbane River catchment. The floods caused damage to dozens of suburbs and tens of thousands of homes and businesses, and 35 people lost their lives. More than 78% of the state of Queensland was declared a disaster zone.

The Queensland Floods Commission of Inquiry found that dam operators did not take account of rainfall forecasts when the manual required them to do so. However, the inquiry did not identify whether operating the dams with regard to the rainfall forecasts would have made a difference.

5.1.2 The funder's role

Omni Bridgeway, one of the world's largest and longest-established funders, financed wider investigation by lawyers representing flood victims and ultimately funded a class action, filed in July 2014 in the Supreme Court of New South Wales, against dam operators Seqwater and Sunwater and the Queensland government, seeking compensation for more than 6,500 people who suffered financial loss or damage following the floods. It was alleged that the dam operators negligently failed to follow the operating manual and did not take account of rain forecasts. The evidence showed that from early December 2010, there were daily flood emergencies, with dams already very full and more rainfall predicted. It was alleged that failing to act on these warning signs and follow the manual caused unnecessary flooding downstream.

Omni Bridgeway underwrote the legal costs associated with the claim, including adverse costs exposure (and entered into a funding participation agreement with another funder).

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

5.1.3 The outcome

Major cases like this class action play a critical role in providing access to justice and helping to ensure better standards and behaviour to avoid future events. Three years after the floods, the Queensland government issued new operating guidelines for managing Wivenhoe Dam. In late 2019, the Supreme Court of New South Wales found that the claim for negligence brought by the class representative was proven against each of the defendants, Queensland Bulk Water Supply Authority, Sun Water Limited, and the state of Queensland, who were vicariously liable for the conduct of the dam operators in causing additional flooding.[10] One of the defendants has appealed the judgment.

5.2 Financing proceedings to recover a non-performing loan in multiple jurisdictions

5.2.1 The situation

A Turkish bank initiated proceedings in connection with a Middle Eastern trading company that had defaulted on a USD 15 million loan, which was backed by a personal guarantee from the chairman and "pater familias" of the family who owned and ran the trading company. Proceedings were progressing very slowly and were forecast to continue for another four to seven years, including a likely appeal. The bank sought funding to de-risk the litigation and seek assistance to enforce any eventual judgment.

5.2.2 Funder's role

Omni Bridgeway provided finance for the proceedings and researched the international assets of the guarantor. It identified valuable real estate in Paris and Dubai, which was partly leased, as well as active art trading through various major art auction houses in Paris, London, the US, and Singapore. Omni Bridgeway instructed lawyers to initiate conservatory attachment proceedings in the US, UK, and France in relation to the real estate, rental income, and possible art. After the guarantor argued that the real estate and art were not owned by him, Omni Bridgeway instructed lawyers in multiple jurisdictions to initiate legal discovery proceedings with art auction houses. This resulted in the disclosure of art-storage contracts and established the guarantor's ownership. Real-estate declarations revealed who the real owner of the real estate was.

5.2.3 The outcome

A settlement was reached in the following months including a repayment of the outstanding loan amount in instalments over a two-year period secured by a pledge over the art.

6. Regulation of third-party funding in Asia

In common-law jurisdictions, such as Singapore and Hong Kong, the doctrines of maintenance and champerty[11] historically restricted the use of third-party dispute funding. These ancient doctrines are now widely considered to be out of date. For example, in recent years, Singapore and Hong Kong, the two leading centres for international dispute resolution in Asia, were the first jurisdictions in the world to have passed legislation expressly facilitating third-party funding in arbitration.

The doctrines of maintenance and champerty do not exist in civil-law countries. In most of these jurisdictions, there are no statutes or cases that expressly prohibit or permit

[10] See http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_classaction/floods.aspx.

[11] *Supra* note 3.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

third-party funding in relation to arbitration or litigation. In some civil-law countries, like Germany, disputes funding is commonplace. In others, including many Asian jurisdictions, the legality of third-party funding has not been tested.

In the context of international arbitration, a detailed report by the International Council for Commercial Arbitration and the School of Law at Queen Mary University of London published in April 2018[12] recognized the growing use of third-party funding and made a number of recommendations for arbitral tribunals to follow.

The following is a brief summary of the regulatory position in some key Asian jurisdictions.

6.1 Singapore

In February 2017, Singapore passed legislation to amend its Civil Law Act that abolished the torts of maintenance and champerty that had previously acted as a restriction upon the scope of funding for commercial disputes and expressly endorsed the third-party funding of international arbitration seated in Singapore (and related court litigation and mediation).[13] For an arbitration funding agreement to be enforceable, the third-party funder must be a "qualifying third-party funder" and comply with any prescribed regulations.[14]

The Singapore International Arbitration Centre issued its Investment Arbitration Rules[15] in 2017, which empower an arbitral tribunal appointed under such rules to order the disclosure of the existence of third-party funding arrangements and/or the identity of the funder, as well as "where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability."[16] The tribunal is permitted to take into account any third-party funding arrangements in apportioning the costs of the arbitration.[17]

Commercial funding in the courts is also permitted under the common law in Singapore, including in relation to claims arising out of an insolvency.[18] In addition, the Insolvency, Restructuring and Dissolution Act (IRDA) came into force on 30 July 2020 with new provisions allowing liquidators and judicial managers to assign to third-party funders the proceeds of actions against those who have misappropriated assets, such as actions relating to undervalue transactions, unfair preferences, and fraudulent and wrongful trading.[19]

On 28 June 2021, further changes came into force in Singapore, with third-party funding of domestic arbitration proceedings (including related court litigation and mediation) and proceedings before the Singapore International Commercial Court (including related appeal proceedings or mediation) now also permitted.[20]

[12] *Supra* note 5.

[13] Civil Law (Amendment) Act 2017 (CLAA 2017) and Civil Law Act (Cap 43), ss. 5A and 5B, and associated regulations.

[14] Civil Law (Third-Party Funding) Regulations 2017.

[15] See https://siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf.

[16] *Ibid.*, Art. 24(l).

[17] *Ibid.*, Art. 33(l).

[18] On 11 September 2018, Chua Lee Meng J. allowed IMF Bentham (now Omni Bridgeway) to fund investigations and potential claims led by the liquidators of Trikomsel Pte Ltd and Trikomsel Singapore Pte Ltd (see https://lawgazette.com.sg/feature/third-party-funding-taking-stock/).

[19] See https://sso.agc.gov.sg/Acts-Supp/40-2018/Published/20181107?DocDate=20181107.

[20] See https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

6.2 Hong Kong Special Administrative Region

In June 2017, Hong Kong enacted similar legislation to Singapore in relation to the third-party funding of domestic and international arbitration, as well as related mediation and court proceedings.[21] The legislation amended the Arbitration Ordinance (Cap 609) to carve out an exception to the doctrines of maintenance and champerty, which have not been abolished in the Special Administrative Region. This legislation came into force in February 2019 when a Code of Practice for Third Party Funding of Arbitration[22] was also issued. The code sets out the practices and standards with which third-party funders, which may include lawyers provided that they are not involved in the relevant arbitration or related proceedings, are ordinarily expected to comply in Hong Kong.

The Hong Kong International Arbitration Centre's 2018 Administered Arbitration Rules contain provisions requiring a funded party to promptly disclose the existence of third-party funding arrangements and the identity of the funder, as well as any changes to the same.[23] An arbitral tribunal appointed under these rules is empowered to take into account any third-party funding arrangement in determining all or part of the costs of the arbitration.[24]

The definition of third-party funders includes those who fulfil the prescribed minimum capital adequacy requirements and have a Hong Kong address for service. The Hong Kong courts have validated third-party funding arrangements for insolvency proceedings on a number of occasions.[25] However, third-party funding of commercial litigation unrelated to arbitration or insolvency proceedings remains limited in Hong Kong.

6.3 Republic of India

India has fewer historical restrictions on third-party funding when compared with other common-law jurisdictions such as Singapore and Hong Kong. The common-law doctrines of champerty and maintenance were held not to be applicable to India[26] and the author is not aware of any cases or decisions in which third-party funding of either litigation or arbitration have been held to be illegal by the courts. Consequently, third-party funding is considered to be legal and litigation-funding agreements enforceable, although funding has not been directly tested in the courts in recent times.[27]

[21] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

[22] See https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf.

[23] See Art. 44 of the 2018 HKIAC Administered Arbitration Rules at https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf.

[24] *Ibid.*, Art. 34.4.

[25] See *Re Cyberworks Audio Video Technology Ltd* [2010] 2 H.K.L.R.D. 1137. In May 2020, the Hong Kong Companies Court went further in *Re Patrick Cowley and Lui Yee Man, Joint and Several Liquidators of the Company* [2020] H.K.C.F.I. 922, and held that it is not necessary for a liquidator to obtain the approval of the court before entering into a third-party litigation-funding agreement.

[26] This has been confirmed by various judgments of the Privy Council (which served as the highest court of appeal in India prior to India's independence from British rule in 1947) and the Supreme Court of India (the highest court of appeal in India post independence).

[27] Although the validity of third-party funding arrangements was not an issue before the court, the Supreme Court made the following *obiter* observation in *Bar Council of India v. AK Balaji* (2018) 5 S.C.C. 379, at [38]: "There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation." An amendment by the Bombay High Court to the Code of Civil Procedure, 1908, relating to security for costs by a third party financing the litigation assumes that third-party funding is permissible for Indian court litigation.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

6.4 Republic of Korea

The current legal framework of Korea does not specifically address third-party funding of arbitration or litigation. No laws or statutes expressly permit or prohibit third-party funding in relation to arbitration or litigation, nor is there an express public policy (such as the common-law doctrines of maintenance and champerty) that would prevent a Korean court from enforcing a third-party funding agreement.

Commentators have opined that further consideration and guidance will help to provide clarity to the dispute-finance industry and parties in Korea wishing to enter into third-party funding arrangements.[28] Subject to taking into account certain statutory provisions that need to be considered in the context of third-party funding, Korean parties involved in international arbitrations seated in Seoul and other key hubs around the world may benefit from funding to manage the cost and risk of complex disputes.

6.5 Japan

In Japan, the legality of third-party funding is similar to the position in Korea. As a civil-law jurisdiction, there are no laws or regulations that prohibit third-party funding[29] and, to the author's knowledge, there have been no judgments by the Japanese courts on its lawfulness. Consequently, in contrast to the common-law jurisdictions of Singapore and Hong Kong, there has been no requirement for a process to "legalize" or expressly permit third-party funding.

Interestingly, an interim report by a Japanese government committee in 2018[30] stated that third-party dispute finance was to be considered as a means of reducing high costs for parties engaged in international arbitration. The report also said that the Japanese government was to consider how to effectively use dispute finance and whether the government should regulate it.

6.6 People's Republic of China

Save for the China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules and the Administrative Measures on Lawyers' Service Fees, Chinese law is silent on third-party funding.

In 2017, CIETAC introduced a set of International Investment Arbitration Rules,[31] which expressly regulate third-party funding. Article 27 requires a funded party to notify the other party, the arbitral tribunal, and the arbitral institution immediately after a funding agreement has been signed. The funded party has a duty to disclose the fact and nature of the funding, the name and address of the third-party funder, as well as "any relevant information of the third party funding arrangement." The tribunal has the power to compel disclosure of this information, and may take this information and a party's compliance with its disclosure obligations into account when ruling on the costs of the arbitration.

If a funder includes a lawyer or law firm from China, Articles 11, 12, and 13 of the Administrative Measures on Lawyers' Service Fees may apply certain restrictions on third-party funding that involve contingency arrangements.[32]

[28] See Glasgow, Kim, & Kim (2018).
[29] See Inoue (2018).
[30] See https://www.cas.go.jp/jp/seisaku/kokusai_chusai/pdf/honbun.pdf.
[31] See http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en.
[32] See Xiao & Tang (2011).

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

7. Social benefits of dispute finance

7.1 Access to justice

Third-party dispute funding provides parties, particularly those who are impecunious or insolvent, with the opportunity to access justice. The high costs of litigation and arbitration, and the decreasing availability of public legal funding in many countries, have led to dispute funding becoming widely accepted by policy-makers and the judiciary as an important means of facilitating access to justice. Parties with meritorious claims, but with limited financial resources, can seek funding to pursue compensation for wrongdoing.

7.2 Class actions

Some third-party funding companies provide finance for class actions. The funding of class actions (or other types of multiparty litigation) enables individuals and companies that do not have the means to bring a claim on their own to seek compensation and justice for losses or other damage caused to them by corporate wrongdoing.

Class actions provide an efficient mechanism for the courts to resolve disputes with a common set of issues. However, they are usually complex, extremely expensive, and take years to resolve. In "loser-pay" jurisdictions, the unsuccessful party is generally ordered to pay the successful party's costs. Therefore, without third-party funding, the claimant (or class representative) faces the prospect of having to pay all of the adverse costs if the action is unsuccessful, in addition to the claimant's own costs (unless the claimant has taken out sufficient "after the event" (ATE) insurance cover). Consequently, the risks that the claimant assumes are disproportionate to the value of their claim. However, when a funder is involved, the funder pays the representative claimant's costs on a non-recourse basis. The funder usually also indemnifies the claimant for any adverse costs. Litigation funding also provides protection for defendants who know that their costs will be paid in the event that the action is unsuccessful.

7.3 Levelling the playing field

Funding also has another important benefit in that it can "level the playing field." A party with limited resources, whether an individual or corporate client, is able to take on a larger defendant with unlimited resources—the analogy often used is "David versus Goliath." Funding allows these claimants to instruct their first choice of legal counsel and to pay for expert reports and other expenses related to the arbitration or litigation that may be necessary to pursue the claim successfully.

7.4 Working capital advance

Where there is sufficient monetary value in claims, funding can be particularly valuable as it can cover not only the cost of pursing the proceedings, but funders can also provide working capital to enable claimants to maintain their day-to-day corporate operations as the claim proceeds. This can provide a vital lifeline to companies incurring large expenses on a regular basis in circumstances in which cash flow has become an issue, such as due to COVID-19 business interruptions.

7.5 Strategic assistance

Some commercial funders offer more than financial support. Those run by highly experienced former dispute lawyers are focused on the timely, efficient, and successful resolution of funded claims for the maximum achievable value. An experienced funder will

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

undertake extensive due diligence to ensure that only meritorious cases are pursued, negotiate a budget with the claimant's lawyers, and ensure so far as possible that the legal costs and strategies are proportionate to the sums at stake in the dispute.

Depending on the rules in the particular jurisdiction, some funders are able to offer strategic assistance during the course of the case itself, assisting with case management and liaising with the lawyers on a day-to-day basis. For example, the funder will wish to ensure that the focus of the case is kept on the real issues in dispute and seek to avoid time and costs being spent on the pursuit of claims that are weak or unnecessary.

8. Potential issues with dispute funding

There are some issues that can arise in third-party funding arrangements. These issues need to be understood and considered by a party that is considering funding and their lawyers so that the party is properly informed and advised about whether to use dispute funding for the particular claim.

8.1 Conflicts of interest

One issue that has been identified is that the claimant's lawyer may be unduly influenced by the funder (as the funder pays the lawyer's fees) and may favour the funder's interests over the interests of the claimant. Lawyers need to carefully assess any relationship they may have with a funder and ensure that all necessary disclosures are made to a client to enable the client to make an informed decision on the question of funding and its risks and benefits.

To address this issue, the funding agreement should expressly recognize that the lawyer owes their full professional and fiduciary duties to their client. The agreement may also provide that, in the event of a conflict of interest between the client and the funder, the lawyer may continue to act solely for the client, even if the funder's interests are adversely affected. In practice, potential conflicts are often resolved as the interests of the client and the funder are aligned in seeking to maximize the return from the claim.

A method of resolving any disagreement over whether or not to settle should be specified in the funding agreement. It may provide that any irreconcilable difference over a proposed settlement offer must be referred to independently nominated counsel for a binding expert opinion on whether the settlement is a reasonable one, or the agreement may include some other form of dispute-resolution clause to address this situation.

In funded arbitrations, another potential or perceived conflict of interest could arise between a funder and one of the arbitrators appointed to arbitrate a dispute. This could arise where the arbitrator has had a prior association with the funder. However, this conflict can be avoided by the funder undertaking the appropriate conflict checks in relation to all the relevant participants in the arbitration before agreeing to fund, and by arbitrators making a disclosure in accordance with various guidelines that have been issued, such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.[33]

8.2 Funder's capacity to pay and unfair terms

As set out above, lawyers and their clients should do careful due diligence on any funders they approach. It is particularly important to check that the funder has adequate financial

[33] Revised and republished in October 2014. See also guidance from the International Chamber of Commerce International Court of Arbitration on conflict disclosure for arbitrators issued in January 2019.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

resources to pay both the claimant's costs and any adverse costs order that it has agreed to cover (if applicable). It is also important for the lawyer to review the terms of the proposed funding arrangement and ensure that the terms are clear and appropriate for the claimant, having regard to its particular circumstances and requirements.

9. Recent trend: corporate funding

In recent years, funding is increasingly being used in Asia and around the globe by better-resourced claimants as a financial- or risk-management tool. Companies seek funding to transfer some or all of the risks associated with the arbitration or litigation to a funder, in particular the risk of having to pay adverse costs (where applicable) if the case is lost. These costs can run into hundreds of thousands and in some cases millions of dollars in large commercial disputes. Therefore, the ability to spread and share these risks with a third party is attractive, even to claimants with strong cash flows.

Given the difficult economic environment caused by the COVID-19 pandemic, the demand for funding from companies is growing.

9.1 Monetizing meritorious legal claims

By using external funding to finance the costs of a dispute, meritorious legal claims are leveraged as assets. This means that the funder pays some or all of these costs in return for a share of the outcome. Companies are able to transfer all or a portion of the legal expenses to the funder, improve their liquidity, and maintain cash on the balance sheet. Companies are able to allocate their resources to "business as usual" or core business needs, while ensuring that meritorious claims are pursue.[34]

Some legal claims can also be monetized by selling them, in whole or in part, to the funder. A debt, judgment, or award, and certain other claims such as insolvency claims, can be sold to the funder via an assignment.

As dispute-resolution finance is non-recourse, if the claim is successful, revenue can be recorded by the business without having incurred any downside costs or risk along the way. Dispute finance therefore helps to transform litigation or arbitration from an expense into a cash-generating asset. Dispute funding therefore provides opportunities for substantial recoveries without negatively affecting profitability along the way.

9.2 Range of dispute-funding products for companies

Given the increasing demand for funding from companies, there has been an expansion of financing products offered by funders. Third-party funding is flexible and can be tailored to the specific needs of a company. For example, it may be used by companies:

- as a cash-flow-management tool and a means of raising corporate finance; companies are able to leverage the value in their contingent arbitration or litigation assets by seeking funding in the form of a capital advance, with no corresponding balance-sheet liability; in some cases, the combined value of a claim or portfolio may be used to secure funds, not only for legal expenditure, but also for general business purposes or simply to declare as profits;[35]

[34] ICCA TPF Report, p. 20.
[35] *Ibid.*, p. 38.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

- for portfolio financing, in which a group of cases are funded together, as a package or portfolio; the funder's return and its costs of funding each of the cases in the portfolio can be recovered from those cases that are successful; as the risk is spread over the portfolio, the overall cost of funding (the funding fee) is generally reduced; portfolio arrangements may also allow the funded party to group together cases that may not provide sufficient monetary value to secure funding on a stand-alone basis;
- on a cost-sharing basis; for example, the funder pays 50% of the claimant's legal fees and other expenses associated with the arbitration or litigation in return for a discounted fee or share of any sum recovered; therefore, the funded party pays only 50% of the costs and receives a greater share of the recovery than if it was receiving full funding.

9.3 Disputes portfolios

The financing of portfolios of disputes is increasing and reflects the growth of dispute finance for corporations and law firms. Two primary forms of portfolios exist for (1) the financing of law firms acting on contingency or success fee arrangements whose clients are parties to disputes; and (2) the financing of funded parties, be they individuals or corporations, with more than one dispute.[36]

The benefits of using portfolios usually involve some form of cross-collateralization across the cases in the portfolio. The funder's return is linked to the overall performance of the portfolio and its risk is therefore spread across the claims within the portfolio, each with varying risk profiles. The funder is likely to be able to offer better overall commercial terms and faster deployment of capital for each individual case in the portfolio. Benefits for corporations include a decreased cost of capital and greater flexibility to potentially fund defence costs.

For law-firm portfolios, the funder assists the firm to meet overhead costs as well as case-specific expenses and, in exchange, the funder shares in the contingency or success fees generated by the firm. Firms may be funded without their clients being aware of the arrangement.

10. Funding for insolvency-related claims and enforcement

10.1 Funding for insolvency-related claims

As mentioned above, dispute funding is also used for insolvency-related claims. These are claims stemming from liquidations and corporate restructurings, and include claims against third parties on behalf of insolvent companies and bankrupt estates, contractual disputes leading up to an insolvency event, claims against directors and officers for breaches of duties that cause or contribute to a corporate collapse, and claims against auditors or other professionals accused of negligence related to the insolvency of a company.

In "loser-pay" jurisdictions such as the UK, Hong Kong, and Singapore, insolvency-related claims are particularly suited to dispute financing because insolvency practitioners and the estates they represent wish to avoid exposure to adverse costs that are typically payable in the event that the case is unsuccessful.

[36] See Gayner, Glasgow, & Landis (2019), p. 248.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

10.2 Funding for the enforcement of awards and judgments

As third-party funding is usually non-recourse, the funder will not recover its investment in the case or receive its fee unless a successful recovery is made by the funded party. For this reason, funders place considerable emphasis on recoverability and whether enforcement action is likely to be necessary.

Some funders have specific enforcement expertise that may also assist with securing a successful recovery. For example, if a company has an unpaid judgment or arbitration award against an unwilling but able debtor, such as a foreign sovereign or business, a third-party funder with asset-tracing and strategic enforcement know-how can significantly enhance the prospects of a recovery. Often companies are unaware of the potential measures that can be taken to pursue payment. Enforcement management services include asset-tracing, formulating, and executing an enforcement strategy. This may involve multiple and simultaneous global enforcement processes.

If enforcement is required, the respondent must have identifiable assets in jurisdictions where funded enforcement action is permissible and is likely to be effective within a reasonable time and cost. If there is a risk that the respondent will try to dissipate or hide assets, then the funder and lawyers will want to consider options to preserve them, such as by seeking freezing orders and other types of injunctions.

11. Conclusion

The ongoing economic impacts of the COVID-19 pandemic are expediting the demand for dispute finance. It is rapidly becoming a mainstream financial product for international claims in Asia and across the globe, including in relation to international commercial and investment treaty arbitration.

Third-party dispute finance is a flexible tool that leverages an asset class that is often ignored. As the COVID-19 crisis has impacted the cash liquidity and the financial stability of many companies, third-party funding can provide a new route to capital—to monetize arbitration or litigation assets and turn meritorious legal claims into a revenue source.

It also plays a valuable role in many jurisdictions, providing access to justice for those without the means to pursue complex and costly disputes, and it levels the playing field against much larger respondents with unlimited resources.

Disputes often take several years to resolve and the path to the recovery of debts is usually far from straightforward, especially for international disputes in which the losing party's assets may lie in more than one jurisdiction. Potential funded parties should take care to ensure that they select the right funder who has sufficient financial resources, strategic insights, and relevant experience and expertise to try and ensure the best possible outcome for their claims.

Acknowledgements. The author extends her sincere gratitude to Kate Hurford, Legal Counsel, Omni Bridgeway, for her invaluable assistance with this article.

References

Gayner, Oliver, Tom Glasgow, & Nathan Landis (2019) "Dispute Funding and the Energy Sector," in R. King, ed., Arbitration in the International Energy Industry, Surrey: Globe Law and Business, 245–51.

Glasgow, Tom, David Kim, & Jin-uk Joseph Kim (2018) "Dispute Resolution Finance in Korea: An Introduction to Basic Concepts of Third Party Litigation and Arbitration Funding, the Development of the Global Industry and its Application to Korea." 9 *Korean Arbitration Review* 39–46.

Inoue, Aoi (2018) "Third Party Funding in International Arbitration: The Perspective from Japanese Law," JCAA Newsletter, March.

https://doi.org/10.1017/als.2021.34 Published online by Cambridge University Press

International Monetary Fund (2021) "World Economic Outlook: Managing Divergent Recoveries," April.
Sahani, V. Shannon, & Lisa B. Nieuwveld (2012) Third-Party Funding in International Arbitration, The Hague: Kluwer Law International.
Xiao, Jianguo, & Xin Tang (2011) "Cost and Fee Allocation in Civil Procedure: China National Report." 4 *Tsinghua China Law Review* 43–68.

Cite this article: Khong, Cheng-Yee (2023). Monetizing Legal Assets: Social and Economic Benefits of Third-Party Dispute Finance in Asia. *Asian Journal of Law and Society* **10**, 204–218. https://doi.org/10.1017/als.2021.34