Exclusive Interview with Professor Lawrence Boo
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Three ‘Pitfalls’ for the Unwary: Third-Party Funding in Asia
by Darius Chan
1. What is your guilty pleasure (if any)?

I have so many! I love to eat and drink, and I also love to play golf.

I really enjoy golf with my friends, many of whom are in the legal profession; mostly in the same age group, from NJC days. To me, golf is a “guilty” pleasure because it takes me away from spending time with my family. There is less “guilt” now that my wife is no longer around.

Food is a guilty pleasure for me because I am at an age where one really needs to watch what you eat.

I also love a good juicy steak with good wine. I love good champagne. And of course, it’s even better when there is good company. Usually, my daughters bring me to the best restaurants, and all I have to do is pay (and eat). They know the best places in town much better than I do.

Recently, I was in Mozambique and ate the local lobsters and langoustines. So sweet, so juicy.

But no innards (intestines) or chicken feet (who knows what they have trodden on).

2. Yes, you were recently in Mozambique! What is the most exotic destination you have been to as an arbitrator?

Abuja, the capital of Nigeria.

I went there for an arbitration, and the panel comprised a former law lord, a local Nigerian professor, and me. Once we landed in Abuja, we were immediately surrounded by many guards to escort us. When we got into the car, the man seated next to the driver was in uniform and armed with a rifle. I’m not sure if this made me feel safer or more uneasy!

That said, Mozambique was eye-opening as well. I spent a week at Maputo, the capital of Mozambique, for a hearing. Thereafter, I went to visit a charity project inland. In a village, I saw seventy families sharing just one well – their only source of water – and men being allowed to take as many wives as they like. It was a different way of life and a reminder not to take what we have for granted.

3. Who do you admire the most and why?

Michael Hwang, S.C.

I really admire his energy. He is a few years older than me but he is still doing so much - he writes, mentors, speaks at conferences, hears arbitrations, and serves in a public office at the Courts of the Dubai International Financial Centre. We should all look up to him.

At the same time, Michael is very humble. He will even call me to
4. What is the most common misconception people have about arbitrators / arbitration?

For lay people, they think that arbitrators decide “arbitrarily” – that’s why they are called “arbitrators”. They also think that arbitrators’ decisions are not binding, and they are not really aware of the difference between mediators and arbitrators.

Sometimes, they also think that arbitral tribunals are subordinate to courts, or that arbitration is a small claims court. Little do they know that these days, the highest value disputes are usually determined through arbitrations.

5. If not an arbitrator, what would you be?

If I did not become an arbitrator, I would probably still be in the legal profession, in practice. If not, maybe I would be a full-time church worker. I have been gently chided by a pastor friend before - “when will you get out of Law and get into Grace!” I am still in the law but enjoying grace and occasionally share on the pulpit to encourage others.

6. What do you think is the biggest change in international arbitration in Singapore between 1991 (the year SIAC commenced operations) and the present?

(1) The number of lawyers doing work in arbitration.

When I first started, I could not identify a law firm that could say they have an arbitration practice. Most cases then were the ad hoc maritime disputes on claims and charterparty cases in London. QCs and the English led the arguments.

Now, all the big firms have arbitration departments. In addition, many foreign law firms have set up here, and continue to set up here, to grow their international disputes practice. That shows Singapore’s development. Singapore is now the most sought after seat in Asia and the 3rd in the world.

(2) From ad hoc to institutional.

When we first started SIAC, most arbitrations were conducted ad hoc. Those cases that were held in Singapore were mainly construction disputes (arising from contracts using the Singapore Institute of Architects standard form) and a few maritime arbitrations.

Since then, the market has embraced institutional arbitration. Standard form contracts adopt ICC or SIAC arbitration clauses. New industries that have developed also adopt institutional arbitrations. Parties have realised the benefits of institutional arbitration, such as legitimacy and ease in enforcement. Knowing that an established arbitral institution has scrutinised the award gives much assurance to the process and helps to reduce some of the questions that parties may face when enforcing the awards in other countries.

Through the years, SIAC has grown from an institution that just hosted arbitrations (much like HKIAC and KLRCA) to one that fully administers arbitrations.
7. What is your favourite (if any) Singapore Court decision on arbitration?

I’m partial—of course I will choose the cases where I was appointed as amicus curiae - PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597 and Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57.

Maybe a third one would be PT First Media TBK v Astro Nusantara International BV and others [2013] SGCA 57. I love how the judges were so conscious that the question of jurisdiction went to the root and that a respondent should have the right to challenge jurisdiction at every stage.

8. On the flip side, is there a Singapore Court decision that you do not like?


This was a case where, with respect, I agree with the Honourable Chan Sek Keong SJ’s dissenting opinion. An award must be final on its terms. A “provisional” award has no place in Singapore law – it is an English construct. When we adopted the Model Law via the International Arbitration Act, Parliament made a conscious decision not to adopt the concept of the “provisional” award as it contradicts the principle of finality of awards.

In its context, a DAB decision is always a holding or provisional decision. It is very artificial to suggest that an award could be made on a DAB decision and be considered “final” even if it is subject to adjustment by a subsequent award on the substantive merits.

9. What is your view on arbitrators who are also practitioners?

This is the issue of double-hatting.

In 1996, when I decided to be a full-time arbitrator, I made a conscious decision to remove the possibility of a situation where I could be representing one party today and sitting as an arbitrator for another matter relating to that party another day.

Being a full-time arbitrator frees me from questions such as “will you be representing these parties again” and removes the potential conflict that arises from viewing the parties before you in arbitration as potential future clients.

For example, if the claimant is a powerhouse, would a person decide to rule in its favour just so that person stand a chance of being appointed as counsel for the claimant in the future? Better yet, what if the respondent is from a neighbouring country which may give you substantial work in the future?

Of course, this is just my view. Others may feel that they can segregate the two and I respect that of course. But for me, I felt it would be better to just sit as an arbitrator and decline any appointment to represent a party as counsel.

This is the condition that anyone who wishes to join The Arbitration Chambers must undertake— not to act as counsel for any parties.

10. What is one of the strangest things that has happened in an arbitration?

To discover that one of my co-arbitrators was compromised.

Once, after the conclusion of an arbitration, the panel had conferred and agreed on some broad terms of the award. After preparing the draft award, I sent part of the draft to one of my co-arbitrators. To my dismay, when the draft was returned to me, this co-arbitrator had completely reversed his decision.

One of my law clerks was looking
12. What do you look for in choosing clerks?

To me, a postgraduate degree is important. I know most Singapore lawyers don’t pursue postgraduate studies – they see no value in it. I know it is not required for practice. I see it differently – graduate studies gives you a new breadth of knowledge and exposure. An LLM, in international law, or banking, or arbitration or a masters in a non-law field add breadth. Going for graduate studies also gives you exposure and connects you to a different group of bright and probing minds. You will have a new or different network of people from different jurisdictions or professions that you will be connected with.

I also like them to have qualifications in different jurisdictions, or to have spent some time at international courts, institutions or have participated in arbitration moots. These would be helpful, but not strictly necessary.

11. What advice do you have for young practitioners seeking to become full-time arbitrators?

There is a cost to becoming a full-time arbitrator. When I first started my practice as a full-time arbitrator, I had two years of famine. I had a few appointments for small shipping cases here and there, but arbitrations typically take 1 to 2 years to complete, which meant I had no income in the interim. After two years, my fees started coming in slowly, and it got better.

Once people know that you are independent and can deliver, and most importantly, that you cannot be compromised, they will start to appoint you.

For young practitioners, I think getting credentials from SIarb or CIarb is a basic requirement. Although credentials are not strictly required for you to be appointed as an arbitrator, getting the recognition from one of these institutions is important. If you cannot even do that, you cannot put a label to your name and it will be very difficult to hold yourself out as an arbitrator.

Also, write articles. Be bold, be creative, be controversial. Don’t write reports about matters that other people already know about. In order to develop thought leadership, we must express our views boldly. If the High Court or Court of Appeal quotes from your article, you get recognition and notice.

Also, speak at conferences, volunteer at YSIAC, teach at the university – but please stay for the long haul. These things will give you exposure and build up your credibility.

Finally, start appointing your peers as arbitrators. Learn to trust each other. If you are any good, it will become obvious. I should add that if you stop getting appointments after an initial few, then maybe you should go on to something else.
Introduction

On 10 October 2018, the Singapore Court of Appeal (Court of Appeal) issued its decision on the case of Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd [2018] SGCA 63 (Marty v Hualon) which concerned a dispute over the repudiation of an arbitration agreement. While the case contained a number of interesting issues, this case commentary will focus on the Court of Appeal’s decision that the commencement of court proceedings is prima facie a repudiation of the arbitration agreement.

Background Facts

On 22 July 2014, the receiver and manager (Receiver) of Hualon Corporation (Malaysia) Sdn Bhd (Hualon) commenced litigation proceedings, on behalf of Hualon, in the courts of the British Virgin Islands (BVI) against Marty Ltd (Marty) for the wrongful deprivation of Hualon’s shareholding in a Vietnamese subsidiary, in breach of the arbitration agreement that was inserted into Hualon’s company charter when it was re-registered in February 2008 (Revised Charter).

According to the Receiver, it was only at the end of February 2015 (some 7 months after the commencement of the BVI proceedings) that it discovered the presence of the arbitration agreement. On 10 March 2015, Hualon filed a Notice of Arbitration with SIAC.

On 26 March 2015, Marty applied to the BVI court for summary judgment to strike out the BVI action by the Receiver. On 20 April 2015, more than one month after the Notice of Arbitration was filed, Hualon applied to the BVI court to stay the BVI proceedings in favour of arbitration. At this point in time, the BVI proceedings had been running concurrently with the arbitration proceedings.

On 19 June 2015, the arbitral tribunal was constituted. In the arbitration, Marty challenged the arbitral tribunal’s jurisdiction but the arbitral tribunal rejected Marty’s challenge and ruled in April 2016 that it had jurisdiction over the dispute.

In May 2016, Marty then commenced proceedings in the Singapore High Court to challenge the arbitral tribunal’s decision, arguing among other things that Hualon’s conduct of commencing the BVI litigation proceedings and taking further steps in the litigation after the commencement of the arbitration meant that Hualon had repudiated the arbitration agreement.

The High Court Judge found inter alia that the BVI action was not a breach as Hualon was unaware of the arbitration agreement and therefore did not have the necessary repudiatory intent. Marty then appealed to the Court of Appeal. The coram consisting of Chief Justice Sundaresh Menon, Justice of Appeal Judith Prakash (who delivered the judgment of the court), and Justice of Appeal Tay Yong Kwang, issued a landmark decision which made the following legal observations.

The Court of Appeal’s decision

• The commencement of court proceedings without any accompanying qualification or explanation by a party bound by an arbitration agreement will be regarded as a prima facie repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause are entitled to expect that disputes arising out of the contract would be
resolved by arbitration and not litigation.\(^1\)

- In this case, the fact that Hualon had sought substantive relief in the BVI proceedings which would resolve the dispute would have led a reasonable person in Marty's position to conclude that Hualon no longer intended to abide by the arbitration agreement and was repudiating the agreement.\(^2\)

- However, this prima facie conclusion can be displaced by furnishing an explanation for the commencement of the court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that there was no repudiatory intent in doing so.\(^3\)

- The assessment of repudiation is an objective inquiry. The breaching party cannot justify the repudiatory breach if the reason was a purely subjective one that was not communicated to the innocent party. In this case, Hualon submitted that it was not aware of the arbitration agreement, which the Court considered would have been impossible for Marty, the innocent party, to discern from the actions of Hualon in commencing litigation proceedings.\(^4\)

- The Court of Appeal thus held that Hualon had repudiated the arbitration agreement by commencing and maintaining court proceedings in the BVI for ten months without reserving its right to arbitration. The fact that Hualon did not have actual knowledge of the arbitration agreement was rejected as the Court of Appeal ruled that parties were in any event deemed to know all of the contractual terms (including the arbitration agreement) of the relevant contractual documents they enter into.

- In addition, it also found that the repudiation was accepted by Marty on 26 March 2015 when it engaged the jurisdiction of the BVI court by requesting for a summary judgment. As this would have disposed of the dispute, the Court of Appeal found this to be an unequivocal indication of Marty's intention to accept the repudiation.

**Comments**

The Singapore Court of Appeal's decision that a commencement of litigation proceedings is prima facie a repudiation of the arbitration agreement is significant in several ways.

**A different approach**

First, this decision is noteworthy as it departs from the established common law jurisprudence on this issue. Until this decision by the Singapore Court of Appeal, there was a clear consensus in case law that the mere commencement of litigation proceedings on its own was insufficient to constitute a prima facie repudiation of the arbitration agreement. Even Marty's counsel (who was arguing for repudiation) had accepted it to be the rule and the Singapore Court of Appeal had also acknowledged the number of authorities supporting this view.\(^5\)

Indeed, the only authority which the Singapore Court of Appeal had relied on in support of its new approach was the English Commercial Court case of Sadruddin Haswani v Nurdin Jivraj [2015] EWHC 998 (Comm). While this case had a different factual matrix (it was about the repudiation of one arbitration agreement in favour of another arbitration agreement), the Court of Appeal was able to distill the following principle:

"Where a party has two methods of dispute resolution open to him, his reliance on one to resolve a dispute on the merits signifies that he does not intend..."
The difference between the Singapore Court of Appeal’s approach and the approach taken in previous jurisprudence such as *Rederi Kommanditselskaabet Mercia IV v Couniniotis SA (The Mercanaut)* [1980] 2 Lloyd’s Rep 183 is a matter of degree: the Singapore Court of Appeal opined that commencement of court proceedings in the presence of an arbitration agreement is a prima facie repudiation, while Lloyd J in *The Mercanaut* was of the view that the commencement of court proceedings is insufficient to show that there was an unequivocal intention to repudiate the arbitration agreement.

While the statements made by the Singapore Court of Appeal are *obiter dicta* and therefore have no binding effect under the common law doctrine of *stare decisis*, it nevertheless remains a highly persuasive legal authority for future cases heard in the Singapore courts.

The effect on parties with arbitrations seated in Singapore

Secondly, this decision is important as it will have consequences for parties with arbitrations seated in Singapore. For example, a party commencing litigation proceedings for the tactical reason of applying more pressure on the opposing party may find itself foreclosed of the option to arbitrate if the opposing party engages in the litigation proceedings. The responding party will likewise be affected if it decides to engage in the litigation proceedings (thereby accepting the repudiation) to defend itself instead of requesting for a stay of proceedings in favour of arbitration. However, parties can provide a disclaimer or explanation in the proceedings to displace the prima facie presumption of a repudiation of the arbitration agreement.

The practical effect of the decision is that parties must give careful thought to which form of dispute resolution it intends to use and what course of action they intend to take instead of doing so in a haphazard manner which will result in concurrent court proceedings and arbitration. There will also be greater efficiency for the parties who choose arbitration or litigation, as it ensures that there is no unnecessary and messy overlap between the two forms of dispute resolution which will save time and costs for the parties and, as a result, reduce wastage of court resources.

**Conclusion**

The Singapore Court of Appeal decision of *Marty v Hualon* is a landmark case which held that the commencement of court proceedings is a prima facie repudiation of the arbitration agreement. Given that it departs from established case law, it is important for parties to be aware of its implications. In particular, parties who intend to resolve their disputes through arbitration should be careful with commencing or engaging in court proceedings without proper disclaimers as that will constitute a prima facie repudiation of the arbitration agreement. This decision should thus be welcomed as it will save time and costs for the parties and, as a result, reduce wastage of court resources.

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6 [55] of *Marty Ltd v Hualon Corporation (Malaysia) Sdn Bhd* [2018] SGCA 63
Independence and impartiality of arbitrators are the hallmarks of any arbitral proceeding. The amendments to the Arbitration and Conciliation (Act) 1996 in 2015, which adopted the international best practices found in the International Bar Association Guidelines on Conflict of Interest (IBA Guidelines), aimed to fulfill precisely these criteria, bolstering not only the neutrality of arbitrators, but also the perception of neutrality as well.

This article attempts to explore and analyse these changes along with the Indian Supreme Court ruling in HRD Corporation v. GAIL (Civil Appeal No. 11126 of 2017), a recent landmark case which similarly deals with the issue of arbitral conflicts, to determine the current judicial position with regards to the eligibility of arbitrators.

**Legislative Framework**

**Pre-amendment**

Prior to the amendment, Section 12 of the Act provided that:

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(3) An arbitrator may be challenged only if-

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) He does not possess the qualifications agreed to by the parties.”

The Amendment Act also inserted a new Fifth Schedule, which listed the grounds and circumstances that would give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Additionally, a new Section 12(5) of the Act was inserted:

“(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.”

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

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1 Arbitration and Conciliation Act 1996, s 12(3)
2 Arbitration and Conciliation Act 1996, s 12(1)(a)
3 Arbitration and Conciliation Act 1996, s 12(5)
Analysis of the Post-Amendment Framework

i. Distinguishing “ineligibility” from “justifiable doubts as to independence and impartiality” of an arbitrator

The Fifth Schedule of the Act (read with Section 12(1)(a) pertains to a different issue from that of the Seventh Schedule (read with Section 12(5)). While the Fifth Schedule lists the various instances giving rise to “justifiable doubts as to the independence and impartiality” of an arbitrator, the Seventh Schedule relates to instances which directly result in the “ineligibility” of a person from being appointed as an arbitrator unless the parties had expressly waived the applicability of the provision in writing after the agreement was entered into.4

ii. Appointment of employees of an arbitrating party as arbitrators

Based on the above understanding, some High Courts of India have distinguished between serving and past officials of an organisation, relying on Entry 1 of the Seventh Schedule for the former and Entries 2, 5, 9 and 12 of the Fifth Schedule for the latter. While the former would be de jure ineligible, the latter would not. The distinction is done considering former employees are seen as neither related to a party as employees, consultants or advisors, nor do they have any other past or present business relationship with the party, as required under Entry 1 of the Seventh Schedule.7

These courts have noted the importance of including such retired officials in tribunals to utilise their technical expertise, which may sometimes be required in disputes which are particularly niche in nature.8 However, these courts recognise the potential pitfalls of such an appointment. An appointment of a former employee may be challenged at a later stage if certain situations arise, such as if the appointee was revealed to be involved to some extent with the project in connection with which the dispute is relating to.9

The Indian Supreme Court recently reiterated the law by stating that, although prior to statutory amendments described above the arbitrator being a current employee of any of the parties was ipso facto not a ground for disqualification, following the amendments, such appointments would be illegal.10

iii. Disclosures under Section 12(1) of the Act

Whether a disclosure of circumstances can give rise to justifiable doubts as to the independence and impartiality of an arbitrator was addressed by the Punjab and Haryana High Court in Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd11. The Sixth Schedule of the Act provides for the form in which necessary disclosures shall be made by such person. Notably, the Sixth Schedule does not require any certificate in the negative stating that no circumstances giving rise to justifiable doubts as to independence and impartiality exists.12 Furthermore, the requirement of disclosure prescribed in Section 12(1)(a) would be fulfilled even if such disclosure is only made to the nominating party rather than all the parties (which can be

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4 Hindustan Construction Co. Ltd v. Ircon International Ltd 2016 SCCOnLine Del 6073 (“HCC v. Ircon”)
7 Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd Arbitration Case No. 166 of 2016 (O&M), decided on 27 October 2016 (“Reliance Infrastructure v. HPGCL”)
8 HCC v. Ircon
9 Afcons Infrastructure Ltd. v. Rail Vikas Nigam Limited 2017 SCC OnLine Del 8675
10 Aravalli Power Company Ltd. v. Era Infra Engineering Ltd Civil Appeal No. 16727-16728 of 2017
11 Relince Infrastructure v. HPGCL
12 ibid
made upon appointment and not necessarily at the time of nomination), since a nomination need not result in the appointment of an arbitrator.\textsuperscript{13}

\textbf{iv. Appointment of practising counsel (including those briefed by lawyers of either party) as arbitrators}

In a recent judgment of the Bombay High Court,\textsuperscript{14} it was affirmed that a counsel’s acceptance of a brief from an attorney or law firm for a different client or for an unrelated matter does not amount to automatic disqualification or ineligibility to being an arbitrator in an arbitration in which the same attorney or law firm is acting. It was further held that, under the Fifth and Seventh Schedules of the Act, for a connection to cause disqualification, there must be a sufficiently proximate relationship between the arbitrator-counsel and the litigant specifically.

Following the statutory amendments described above, the disputes before the Indian courts have primarily revolved around the appointment of former or serving employees as arbitrators, and whether there were “\textit{justifiable doubts as to independence and impartiality}” and “\textit{ineligibility}” of arbitrators. The Act does not lay down any conditions to identify the “circumstances” which may give rise to “justifiable doubts”. Thus, the threshold for disqualification of arbitrators continues to be highly subjective, even though the Schedules of the Act intended otherwise. This is exacerbated by the fact that the overlaps of the entries in the Fifth Schedule and Seventh Schedule have been rarely explored by the Indian courts. In a recent judgment of \textit{HRD Corporation v. GAIL}, the Indian Supreme Court dealt with the appointment of former judges as arbitrators, who may be associated in previous disputes involving one or more parties to the arbitration.

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\begin{tabular}{|c|c|c|}
\hline
\textbf{Arbitration No.} & \textbf{Relevant period} & \textbf{Arbitrators} \\
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\hline
2. & 2007-2010 & Same as above. \\
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4. & 2016-2019 & Justice K. Ramamoorthy replaced by Justice Mukul Mudgal (nominated by Appellant) \\
& & Justice T.S. Doabia (nominated by Respondent) \\
& & Justice T.S. Doabia and Justice K. Ramamoorthy appointed Justice K.K. Lahoti \\
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\textbf{HRD Corporation v. GAIL (Civil Appeal No. 11126 of 2017)}

\textbf{Overview of facts}

The parties entered an agreement on April 1, 1999 for the supply of wax for a continuous period of 20 years. Subsequently, disputes arose between the parties under the agreement on the pricing and withholding of products. HRD Corporation (Appellant) invoked the arbitration clause, initiating a total of four arbitrations on the above issues.

\textsuperscript{13} ibid

\textsuperscript{14} Sheetal Maruti Kurundwade v Metal Power Analytical Pvt Ltd & Ors (2017) 3 AIR Bom R 68
The present dispute arose from the fourth arbitration. Two applications were filed by the Appellant under Sections 12(3), 12(5), 13 and 14 of the Act read with the International Centre for Alternative Dispute Resolution Rules 1999, seeking the termination of Justice T.S. Doabia and Justice K.K. Lahoti due to an alleged prior association. The challenge was on the ground that Justice Lahoti had previously given an opinion on a legal issue between GAIL and another public-sector undertaking in the year 2014; whereas Justice Doabia had previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period. These allegations were rejected by the arbitral tribunal.

While deciding the case, the Indian Supreme Court scrutinised the Schedules of the Act through an itemised comparison between the Fifth Schedule of the Act and the IBA Guidelines, including references to the Red, Orange and Green Lists of the latter. The Act is currently the only arbitration statute to have adopted the lists contained in the IBA Guidelines on Conflicts of Interest in international arbitration.

With respect to whether there were justifiable doubts as to independence and impartiality, the Indian Supreme Court held that a broad commonsensical approach was to be adopted.

Regarding the Seventh Schedule of the Act, the Supreme Court held as follows:

i. Entries 1 and 2 of Seventh Schedule

Entries 1 and 2 refer to circumstances where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party; and where the arbitrator represents or advises one of the parties or an affiliate of one of the parties.

Justice Lahoti was neither a serving employee nor a consultant nor an advisor to the party. He had only given a professional opinion (and not emanating from any business relationship) to the Respondent which was unrelated to the present dispute. Therefore, disqualification under Entry 1 did not arise.

Furthermore, Entry 2 was inapplicable since it concerns “current” representation or advice rendered to the Respondent, which did not apply in this case.

With respect to Justice Doabia’s appointment, it was held that the appointment of a person as an arbitrator is not equivalent to a “business relationship.”

ii. Entries 8, 15 and 16 of Seventh Schedule

Entries 8, 15 and 16 refer to circumstances where the arbitrator regularly advises the appointing party or an...
affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom, where the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties, and where the arbitrator has previous involvement in the case.

These entries were held to be inapplicable in the present case as no advice was rendered by Justice Lahoti to the Respondent on a regular basis.

Entry 15 was similarly inapplicable, because the Indian Supreme Court found that no legal advice or expert opinion was provided on the dispute in hand. Justice Lahoti’s legal opinion which was given way back in 2014 was in relation to another issue. Similarly, in Justice Doabia’s case, it was held that an award rendered by an arbitrator in a previous arbitration cannot be read as a grant of a legal opinion under this Entry.

Lastly, “previous involvement in the case” under Entry 16 was read as referring to previous involvement in the “present dispute”, rather than merely the same agreement. Consequently, despite Justice Doabia having previously been an arbitrator between the same parties, he would not be rendered ineligible under Entry 16.

iii. Identical entries in the Fifth and Seventh Schedules

With respect to the presence of the same Entries 1 to 19 in both Schedules, the Indian Supreme Court explained that arbitrators would have to make disclosures of their independence and impartiality as per the entries in the Fifth Schedule, which would otherwise be unknown to the parties. Based on such disclosures, eligibility would be determined under the Seventh Schedule read with Section 12(5) of the Act.

Conclusion

Even though the Schedules of the Act under consideration are premised on the IBA Guidelines, HRD Corporation was nonetheless a landmark case, as the Indian Supreme Court had for the first time engaged in an itemised comparison of the Green, Orange and Red Lists (as provided in the IBA Guidelines) with the Schedules. With the avid use of extrinsic aids to interpretation e.g. the IBA Guidelines, 246th Indian Law Commission Report etc. and intrinsic aids like the headings in the Schedules, the Indian Supreme Court sought to decipher the exact meaning and intention of the relevant entry in the Schedules and to understand the intention and adopt a purposive interpretation of the provisions. However, this exercise was limited to the extent of the contentions raised and referred to by the parties. It is yet to be seen whether the Indian courts would continue to uphold the spirit of these amendments, especially that of the Schedules, in the years to come.
For some time practitioners would have seen news alerts headlining that third-party funding is now permitted in Singapore and Hong Kong for arbitration and arbitration-related court proceedings. Digging a little deeper beyond the shiny new labels, this article highlights three practical “pitfalls” which practitioners would have to be mindful of when dealing with third-party funding in Singapore and Hong Kong.

First, there are various disclosure obligations (and in Singapore, those obligations fall on counsel); secondly, funded claimants should expect to see respondents filing requests for the funded claimant to disclose the terms of the funding agreement; and thirdly, respondents ought to be aware that costs of litigation funding may be awarded against the respondent as part of a costs award.

Disclosure Obligations

Generally speaking, registered foreign lawyers and Singapore solicitors who are bound by Singapore’s Legal Profession (Professional Conduct) Rules 2015 (Singapore PCR) must disclose, to the court or tribunal and every other party to the proceedings, the existence of any third-party funding contract, as well as the identity and address of any third party funder, “when conducting any dispute resolution proceedings before a court or tribunal”1. For funding contracts entered into prior to the commencement of proceedings, the disclosure must be made at the date of commencement of those proceedings. For funding contracts entered into on or after the date of commencement of proceedings, disclosure must be made “as soon as practicable”2.

In Hong Kong, under Article 98U of the Arbitration Ordinance, a funded party is obliged to give written notice of the fact that a funding agreement has been made, and the name of the funder, to each other party and the arbitration body (which is defined to mean the tribunal or court, the emergency arbitrator or the mediator as the case may be). For funding contracts entered into on or before the commencement of proceedings, the disclosure must similarly be made on commencement of those proceedings. For funding contracts entered into after the date of commencement of proceedings, disclosure must be made within 15 days after the funding agreement is made.

Taking a step back, disclosure is seen to be important in avoiding potential conflict of interests, for example, an arbitrator or her colleagues or firm may have a relationship with a third-party funder involved in the case or where there are repeat appointments for an arbitrator in cases involving the same funder. However, unlike Hong Kong which places the disclosure obligation on parties, Singapore has chosen to place the disclosure obligation on counsel instead. This raises several issues.

First, it may create an uneven playing field. Unregistered foreign counsel who “fly in and fly out” of Singapore to represent parties in Singapore-seated arbitrations do not appear to be bound by the disclosure requirements under the Singapore PCR.

Second, the involvement of one Singapore-registered counsel (whether junior or otherwise) in an otherwise multi-jurisdictional counsel team may in and of itself trigger the disclosure obligations under the Singapore PCR.

Third, under section 98N of the Hong Kong Arbitration Ordinance, the disclosure obligation appears to be triggered not just for arbitrations

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1 Rule 49A(1) of the Singapore PCR.
2 Rule 49A(2) of the Singapore PCR.
seated in Hong Kong, but also for arbitrations where the legal services for that arbitration are provided in Hong Kong. The situation is less clear for Singapore. Are the disclosure obligations on counsel under the Singapore PCR triggered for Singapore-seated arbitrations, or arbitrations seated elsewhere but heard in Singapore, or both? The definition of “tribunal” under the Singapore PCR defines the term “tribunal” to mean “... any tribunal in Singapore that is established by law” including “any arbitral tribunal as defined in ... section 2(1) of the International Arbitration Act”. Arguably this definition extends to (i) Singapore-seated arbitrations regardless of where hearings are conducted; and (ii) arbitration proceedings with hearings conducted in Singapore regardless of the seat of the arbitration; although this is by no means clear.

It may be a matter of time before all major arbitral rules (and investment treaties) require parties to disclose the existence of third-party funding arrangements. For instance, Rule 44 of the new 2018 HKIAC Administered Arbitration Rules coming into force on 1 November 2018 contains such disclosure rules. Under Rule 24(l) of the SIAC Investment Arbitration Rules, the Tribunal has the express power to order disclosure of the existence of a party’s third-party funding, including details of the funder’s interest in the outcome of the proceedings.

In this connection, practitioners should be aware of SIAC Practice Note PN – 01/17 dated 31 March 2017 (SIAC Practice Note) which sets out standards of practice and conduct to be observed by arbitrators in SIAC arbitrations that are funded. The SIAC Practice Note provides that arbitrators have the power to order the disclosure of the existence of third-party funding, including details of the funder’s interest in the outcome of the proceedings.

What next if one finds oneself in a proceeding where a funded party (typically the claimant) has made a disclosure on the existence of a funding agreement?

**Security for costs & disclosure of terms of funding agreement**

A possible first reaction may be to think about applying for security for costs against the funded claimant. Such an application may be accompanied or preceded by an application seeking an order that the claimant discloses the terms of the funding agreement. Consequently, funded claimants should expect to see respondents filing such disclosure requests.

Respondents seeking security will typically argue that, in the absence of security, the respondent will be unable to enforce a potential costs award against the claimant because...
the claimant has no funds of its own, and the respondent has no means of enforcement against the third-party funder directly. The counter-argument for claimants has been that “[t]he fact of having financing alone does not imply risk of non-payment” and that ordering security every time that third-party funding is established would “increase[s] the risk of blocking potentially legitimate claims”. The SIAC Practice Note expressly states that the involvement of a funder alone shall not be taken as an indication of the financial status of a disputant party.

Hitherto, investment and commercial arbitration tribunals tend to reject security for costs applications which are mainly or exclusively based on the grounds that the claimant is funded by a third party funder. Nevertheless, there is a practical difference when it comes to burden of proof. At one end of the spectrum it is well-known that, Gavan Griffith QC, in his capacity as tribunal member in an investor state arbitration has suggested that, once third-party funding is revealed, “the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs should not be made”. A similar approach has been suggested by others, namely “where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists”.

In relation to an application for security for costs, the terms of a funding agreement are arguably relevant, such as whether the funder is liable to pay an adverse costs order against the claimant and whether and under what conditions the funder can stop funding the claimant. Consequently, practitioners acting for respondents may consider taking out applications requesting that the claimant disclose the terms of the claimant’s funding agreement—one would expect such applications to be made almost routinely when a claimant has disclosed the existence of a funding agreement in the first instance.

Hitherto, investment arbitration tribunals have been divided on whether to allow such applications for disclosure. It has been suggested that tribunals ought to accept an application for disclosure of third-party funding agreements, but should limit disclosure orders to the provisions that are strictly necessary to assess the extent to which the funder may cover (or not) an adverse costs order. In any event, a funded claimant ought to be prepared that all the terms of its funding agreement would be subject to disclosure.

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4 South American Silver v Bolivia, Procedural Order No. 10 dated 11 January 2016, paragraphs 75 to 77.
5 See for instance, Guaracachi America, Inc. and Rurelec PLC v Bolivia (UNCITRAL), Procedural Order No. 14, 11 Mar 2013; EuroGas Inc. and Belmont Resources Inc. v Slovak Republic (ICSID), Procedural Order No. 3, 23 Jun 2015; South American Silver Limited (Bermuda) v Bolivia (UNCITRAL), Procedural Order No. 10, 11 Jan 2016. See also ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, Chapter 6.
6 RSM Production Corporation v St Lucia, Assenting Reasons of Gavan Griffith QC dated 12 August 2014, paragraph 18.
8 See, for instance, South American Silver Limited (Bermuda) v Bolivia (UNCITRAL), Procedural Order No. 10, 11 Jan 2016; Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v Turkmenistan (ICSID), Procedural Order No. 3, 12 Jun 2015; Guaracachi America, Inc. and Rurelec PLC v Bolivia (UNCITRAL), Procedural Order No. 13, 21 Feb 2013; Teinver S.A. et al v Argentina (ICSID), Decision on Jurisdiction, 21 Dec 2012.
9 ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, Chapter 6.
Does the foregoing mean it would be in the claimant’s interest to resist disclosure of the terms of its funding agreement?

Costs of Litigation Funding Included As Part of Costs Award

Arguably no. This is because an arbitral tribunal seated in Singapore or Hong Kong could order that the costs incurred by a party to obtain funding is to be borne by the opposing party.

The Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration has suggested that costs of obtaining third-party funding could be awarded as part of a costs award, subject to (i) the test of reasonableness; and (ii) disclosure of the details of funding costs from the outset of or during the arbitration so that the award debtor can assess its exposure.

In *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), the English High Court upheld a costs award under which the funder was entitled, if Norscot succeeded, to an uplift equivalent to 300% of the funding or 35% of Norscot’s recovery, whichever was greater.

Under sections 59 and 61 of the English Arbitration Act 1996, a tribunal may make an award allocating the costs of the arbitration between the parties. The costs of the arbitration include “legal or other costs of the parties”. The English High Court took the view the phrase “other costs” can include the costs of obtaining litigation funding. The awarding of such costs was therefore within the tribunal’s general discretion on costs.

It was not clear from the judgment whether Essar was aware, at the outset, of Norscot’s terms of funding, but the judgment did record how Essar had forced Norscot, by Essar’s unreasonable conduct, into a position where Norscot had no alternative, but to obtain third-party funding.

The statutory provisions in Singapore and Hong Kong do not provide that an arbitrator can award “legal or other costs of the parties”. For instance, Article 74 of Hong Kong’s Arbitration Ordinance provides that an arbitral tribunal may include in an award directions “with respect to costs of the arbitration proceedings”.

In an appropriate case, it is therefore arguable that a SIAC or HKIAC tribunal in a Singapore or Hong Kong-seated arbitration could award the costs of third-party funding as part of its costs award against a respondent.

Institutional rules are perhaps clearer on this issue. Rule 37 of the SIAC Rules 2016 provides that the tribunal shall have the authority to order “the legal or other costs of a party be paid by another party” (italics added). The SIAC Practice Note further states that a tribunal may take into account the existence of any funder in (i) apportioning the costs of the arbitration; and (ii) in ordering in its award that all or a part of the legal or other costs of a party be paid by another party. Similarly, Rule 35 of the SIAC Investment Arbitration Rules and Rule 34.4 of the 2018 HKIAC Administered Arbitration Rules both allow an arbitral tribunal to take into account any third-party funding arrangement in fixing and apportioning the costs of arbitration.

Hitherto, the Singapore courts have been reluctant to interfere with a tribunal’s costs award. The Hong Kong courts have gone a step further by granting, in the absence of special circumstances, indemnity costs for unsuccessful challenges to an arbitration agreement or to an award. In an appropriate case, it is therefore arguable that a SIAC or HKIAC tribunal in a Singapore or Hong Kong-seated arbitration could award the costs of third-party funding as part of its costs award against a respondent.

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10 *VV v VW* [2008] 2 SLR(R) 929.