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# **The Role of the Doctrines of Champerty and Maintenance in Arbitration**

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# The Role of the Doctrines of Champerty and Maintenance in Arbitration

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## 1. INTRODUCTION

This article considers whether a law introduced in the Middle Ages to curb the power of influential English barons has any application, half a millennium later, to a domestic or international arbitration held in a common law-based jurisdiction. The growth in third-party dispute-resolution funding in recent years and the increasing involvement of financial institutions such as hedge funds in providing external funding to arbitration and litigation, bring into sharp focus the question as to the extent to which such a modern approach is reconcilable with the centuries-old doctrines of champerty and maintenance.

The mixed signals which have emerged from the courts of different common law jurisdictions over the years have only served to muddy the waters further in what is an already complex area. There is a dearth of authority but one of the more recent cases dealing with the tension between the strictures of the doctrines of champerty and maintenance on the one hand, and the modern approach toward the funding of commercial arbitrations on the other, is the decision of the Hong Kong High Court in *Cannonway Consultants Ltd v Kenworth Engineering Ltd*,<sup>1</sup> where Kaplan J. found that the doctrine of champerty was of no application to the field of arbitration.

However, the Singapore Court of Appeal took a different view in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*,<sup>2</sup> relying on the reasoning that the public policy consideration of the need to protect “the purity of justice and the interests of vulnerable litigants” militated against allowing champertous agreements to prevail, even in an arbitral context.

The role of the doctrines of champerty and maintenance in a modern context received further treatment by the Hong Kong Court of Final Appeal where, in a masterful analysis of the case law in the area, Ribeiro P.J., delivering the judgment of a unanimous bench in *Unruh v Seeberger*,<sup>3</sup> emphasised the need for the public policy considerations upon which the doctrines of champerty and maintenance were pivoted to be evaluated through modern lenses and to be balanced against other countervailing public policy considerations such as the promotion of access to justice and the recognition of legitimate common interests in litigation.

## 2. HISTORIC ORIGINS

Any evaluation of the role which the doctrines of champerty and maintenance should play in a modern day context should begin with an examination of their historic origins, for it is only against such a background that they can be analysed properly for the purpose of ascertaining the extent to which they should have any role to play in regulating the conduct of arbitrations.

The doctrine of maintenance is an invention which was directed against wanton and officious intermeddling with the disputes of others in which the intermeddler has no interest whatever, and where the assistance rendered is without justification or excuse.<sup>4</sup> Champerty,

<sup>1</sup> *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 H.K.C. 179.

<sup>2</sup> *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2006] SGCA 46.

<sup>3</sup> *Unruh v Seeberger* [2007] 2 H.K.L.R.D. 414.

<sup>4</sup> *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 K.B. 1006 at 1014, per Fletcher Moulton L.J.

on the other hand, is an aggravated form of maintenance, the distinguishing feature of which is the receipt of a share of the proceeds of the litigation by the intermeddler.<sup>5</sup>

The doctrines of champerty and maintenance are common law creations of considerable antiquity which trace their origins back to a bygone era. They were created in response to the medieval practice of assigning doubtful or fraudulent claims to persons of wealth and influence in the expectation that such individuals would enjoy greater success in prosecuting those claims in court, in exchange for which they would receive an entitlement to the spoils of the litigation. In order to safeguard the administration of justice, instances of champerty and maintenance were made subject to criminal and tortious liability and a common law rule was developed, striking down champertous agreements and contracts of maintenance as being unenforceable on the grounds of public policy.

Criminal and tortious liability for champerty and maintenance has since been abolished in England,<sup>6</sup> although the doctrines continue to survive in respect of the litigation of contractual claims albeit that their strength has been eroded over the years.

### 3. DEFENDERS OF THE INTEGRITY OF JUSTICE: *BEVAN ASHFORD AND OTECH*

When confronted with the question as to the extent to which the doctrine of champerty had any role to play in regulating the conduct of parties in arbitration, the Singapore Court of Appeal adopted a purist approach in *Otech*, holding obiter that the application of the doctrine of champerty should not be confined to litigation as the need to protect “the purity of justice and the interests of vulnerable litigants”, which the doctrine of champerty is designed to protect, is as important in arbitral proceedings as in court proceedings.<sup>7</sup>

The Singapore court expressed its view that the law of champerty stems from public policy considerations which apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or whether they have resorted to a private dispute-resolution system like arbitration, and that it would be artificial to differentiate between arbitral and court proceedings and say that champerty applies to the latter because it is conducted in a public forum and not to the former because it is conducted in private.<sup>8</sup> To this end, the Court expressly adopted the reasoning of Sir Richard Scott V.C. in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd*<sup>9</sup>:

“Arbitration proceedings are a form of litigation. The *lis* prosecuted in an arbitration will be a *lis* that could, had the parties preferred, have been prosecuted in court. The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. I find it quite impossible to discern any difference between court proceedings on the one hand and arbitration proceedings on the other that would cause contingency fee agreements to offend public policy in the former case but not in the latter. In principle and on authority, the law of champerty ought to apply, in my judgment, to arbitration proceedings as it applies to proceedings in court. If it is contrary to public policy to traffic in causes of action without a sufficient interest to sustain the transaction, what does it matter if the cause of action is to be prosecuted in court or in an arbitration? If it is contrary to public policy for a lawyer engaged to prosecute a cause of action to agree that if the claim fails he will be paid nothing but that if the claim succeeds he will receive a higher fee than normal, what difference can it make whether the claim is prosecuted in court or in an arbitration?”

<sup>5</sup> *Giles v Thompson* [1994] 1 A.C. 142; [1993] 2 W.L.R. 908; [1993] 3 All E.R. 321 at 328, per Steyn L.J.

<sup>6</sup> Criminal Law Act 1967 ss.13, 14.

<sup>7</sup> *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2006] SGCA 46 at [36].

<sup>8</sup> *Otech* [2006] SGCA 46 at [38].

<sup>9</sup> *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch. 239 at 249D-G; [1998] 3 W.L.R. 172.

#### 4. TURNING BACK THE HANDS OF TIME: *GILES V THOMPSON AND CANNONWAY CONSULTANTS*

As Steyn L.J. astutely observed in *Giles v Thompson*<sup>10</sup>:

“[I]f there is a controversy about the scope of a legal rule, or a head of public policy, a good starting point is to inquire into the historical origin of it.”

In a judgment with which Sir Thomas Bingham M.R. agreed, Steyn L.J. noted that the weight of authority up until that stage supported the proposition that the head of public policy upon which the doctrine of champerty rested is directed towards a specific aim, the need to protect the integrity of public civil justice, and that it would involve a radical new step to extend the doctrine to private consensual arbitration.<sup>11</sup>

It is essential to place the public policy considerations upon which the doctrines of champerty and maintenance are pivoted in their proper historical context in order to understand if they can be relied on to justify their application to the sphere of arbitration. These doctrines had been originally introduced as mechanisms by which particular abuses which had arisen in English medieval society could be checked, abuses which were graphically described by Kaplan J. in *Cannonway Consultants* in the following terms, citing a passage from *The Works of Jeremy Bentham*<sup>12</sup>:

“A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a Baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a 100 barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.”

The considerations which led to the creation and application of the doctrines of champerty and maintenance to court-based litigation, which is conducted in a public forum, do not apply to arbitration which is conducted in private.<sup>13</sup> Parties to arbitration are accorded a greater degree of latitude in relation to procedural matters than parties engaged in litigation. It would therefore not be artificial for rules which apply to the latter to be excluded from the former. The principle of party autonomy is the cornerstone upon which arbitration rests and, in circumstances where the parties to arbitration may have agreed, whether expressly or implicitly, to an arrangement by one or more of their number that savours of champerty or maintenance, such an arrangement ought not to be rendered nugatory by the sort of public policy considerations which the courts in *Otech* and *Bevan Ashford* had in mind.

It is suggested that this is what Steyn L.J. was considering when he warned against “a radical new step to extend the doctrine to private *consensual* arbitration”<sup>14</sup> and also explains what Kaplan J. was referring to when he criticised the extension of “champerty from the public justice system to the private *consensual* system which is arbitration”.<sup>15</sup> Support for

<sup>10</sup> *Giles v Thompson* [1994] 1 A.C. 142; [1993] 2 W.L.R. 908; [1993] 3 All E.R. 321 at 328.

<sup>11</sup> *Giles v Thompson* [1994] 1 A.C. 142; [1993] 2 W.L.R. 908; [1993] 3 All E.R. 321 at 331–332.

<sup>12</sup> *The Works of Jeremy Bentham* (1843), Vol.3, letter XII: “Maintenance and Champerty”. See also *Giles v Thompson* [1994] 1 A.C. 142; [1993] 2 W.L.R. 908; [1993] 3 All E.R. 321 at 328; *Martell v Consett Iron Ltd* [1955] Ch. 363; [1955] 2 W.L.R. 463, per Danckwerts J.; and P.H. Winfield, “The History of Maintenance and Champerty” (1919) 35 L.Q.R. 50.

<sup>13</sup> *Otech* [2006] SGCA 46 at [38].

<sup>14</sup> *Giles v Thompson* [1994] 1 A.C. 142; [1993] 2 W.L.R. 908; [1993] 3 All E.R. 321 at 332.

<sup>15</sup> *Cannonway Consultants* 190.

this view can be derived from the fact that the doctrine of champerty is confined only to agreements governing English litigation, so that a champertous agreement made in England will be found to be valid if it relates to litigation in a jurisdiction where champerty is lawful.<sup>16</sup>

It is therefore perfectly possible for two champertous agreements to be treated differently by an English court depending on whether the agreement savouring of champerty is prohibited in the jurisdiction which the litigation which forms the subject-matter of the agreement concerns. This only serves to underline the fact that the head of public policy upon which the doctrines of champerty and maintenance rests is designed to protect the integrity of the English judicial system and the administration of civil justice in this country. It is not intended to be an overriding head of public policy.<sup>17</sup>

## 5. RE-EXAMINING CHAMPERTY AND MAINTENANCE IN A MODERN LIGHT: *UNRUH V SEEBERGER*

There is considerable scope for arguing that public-policy considerations (as they have evolved over time) no longer justify the striking down of arrangements savouring of champerty or maintenance, particularly as conditional fee agreements are now readily used in litigation in many jurisdictions and in circumstances where alternative methods of funding arbitral proceedings have become increasingly commonplace.

The rules of public policy are, after all, not immutable and cannot be regarded as impervious to changes rendered necessary by the passage of time. It could therefore be said that irrespective of the historical basis of the doctrines of champerty and maintenance, public policy considerations must be regarded as having evolved sufficiently so as to guard against:

“[A] result that upheld as lawful a conditional fee agreement for use in court proceedings but condemned as unlawful the identical conditional fee agreement for use in an arbitration.”<sup>18</sup>

That public-policy considerations, including those upon which the doctrines of champerty and maintenance rest, do not remain static over the course of time, is clear from the decision of the Hong Kong Court of Final Appeal in *Unruh* which, although concerned with the doctrines of champerty and maintenance in broad terms and not confined to its application in an arbitration context per se, is nevertheless instructive in its analysis of the competing considerations which are to be brought to bear in evaluating the role which these doctrines have to play in the modern context.

Ribeiro P.J. delivered the judgment in *Unruh* with which the other judges (Li C.J., Bokhary P.J., Chan P.J., McHugh N.P.J.) agreed. He said (at [86]):

“The prohibition of maintenance and champerty is a matter of public policy and involves a value judgment that certain conduct should be considered ‘officious intermeddling’ in someone else’s litigation or ‘trafficking in litigation’ which deserves to be made unlawful. Unsurprisingly, the content of that value judgment has fundamentally changed, reflecting the radical development of society in general and of the legal system in particular over the last seven hundred years. . . .

[At [89]] The early policy imperatives have long gone and by the 19th century it was widely recognized that maintenance and champerty had acquired a wholly different complexion,”

<sup>16</sup> *Trepca Mines Ltd (No.2), Re* [1963] Ch. 199 at 218; [1962] 3 W.L.R. 955, per Lord Denning M.R.

<sup>17</sup> *Giles v Thompson* [1994] 1 A.C. 142; [1993] 2 W.L.R. 908; [1993] 3 All E.R. 321 at 332.

<sup>18</sup> *Bevan Ashford* [1999] Ch. 239 at 251C-D; [1998] 3 W.L.R. 172.

## CHAMPERTY AND MAINTENANCE IN ARBITRATION

before going on to cite Lord Roskill's speech in *Trendtex Trading Corp v Credit Suisse*<sup>19</sup> that, in the 20th century:

“[T]he courts have adopted an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case.”

The emergence of more liberal judicial attitudes to arrangements which, on a strict view, could be said to be savouring of champerty or maintenance is reflective of the shift in emphasis from the public policy considerations which gave rise to the emergence of those medieval doctrines to the countervailing public-policy argument that, rather than opposing these arrangements, they should in fact be supported as they help widen access to the court system and arbitration, and enable parties, who might not otherwise for cost considerations be able to participate in litigation and arbitral proceedings, to do so. It is now common to find a wide array of non-conventional funding options available to would-be litigants, including many which are provided by third parties. Not only are such arrangements not frowned upon, they are generally welcomed as a positive means by which to widen access to the court system and, by logical extension, to arbitration. Judicial support for such an approach can be traced back to as long ago as the 19th century, as is evident from the remarks of the Privy Council in *Coondoo v Mukerjee*, per Sir Montague Smith<sup>20</sup>:

“A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.”

As Ribeiro P.J. noted (at [97]):

“It is... obvious that [the] access to justice category is not static. The development of policies and measures to promote such access is likely to enlarge the category and to result in further shrinkage in the scope of maintenance and champerty.”

He summarised the current approach:

- The traditional legal policies underlying maintenance and champerty continue to apply, although they must be substantially qualified by other considerations (at [100]).
- The fact that an arrangement may be caught by the broad definitions of maintenance and champerty is not in itself sufficient to found liability and the totality of the facts must be examined, asking whether they pose a genuine risk to the integrity of the process. It is not enough to say that an agreement is of the type which “savours of” champerty (at [102]).
- Countervailing public policies must be taken into account, especially those in favour of ensuring access to justice and of recognising, where appropriate, legitimate common interests of a social or commercial character in a case. The traditional public policies against intermeddling must be weighed against such competing values and, if the balance is in favour of the latter, the conduct complained of should not be regarded as contrary to public policy (at [103]).
- It is important not to confuse related but separate policies with those which properly underlie the operation of maintenance and champerty. For example, an agreement to take a

<sup>19</sup> *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679 at 702; [1981] 3 W.L.R. 766.

<sup>20</sup> *Coondoo v Mukerjee* (1876–77) L.R. 2 App. Cas. 186 at 210.

share of any proceeds from an action may be primarily objectionable because it involves the unconscionable exploitation of a vulnerable litigant. Or it may be considered objectionable for solicitors to enter into such an arrangement because it is thought likely to give rise to conflicts of interest. It may be right to strike down the arrangement in some cases but, in others, doing so in reliance on the law of maintenance and champerty may be to use too blunt an instrument as it may result in a litigant being left with no means to pursue a good claim. Resort might more appropriately be had in such cases to other doctrines and remedies more suited to granting relief to the exploited party or to confronting professional misconduct (at [104]).

## 6. CONCLUSION

The background against which disputes are now resolved has changed considerably from the times that powerful but meddling English barons roamed the land. The heads of public policy which were relevant in medieval England must necessarily evolve in order to take into account the shift in attitude to the manner in which commercial dispute-resolution is now funded. As the judgment of the Hong Kong Court of Final Appeal in *Unruh* demonstrates, it is no longer appropriate to use the doctrines of champerty and maintenance as blunt instruments with which to strike down third-party funding arrangements; a more qualitative analysis of the nature of the arrangement concerned is required in order to assess whether it in fact poses a genuine risk to the integrity of the process.

These considerations must apply a fortiori to those cases where the parties have elected to resolve their differences through a private, consensual dispute-resolution mechanism such as arbitration, to which the public policy aim of protecting public civil justice has even more limited relevance.