Third-Party Funding Finds its Place in the New ICC Rules

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Third-party funding (**TPF**) has come a long way from its humble beginnings at the fringes of various jurisdictions, where it was historically a tort and even a crime. Today, the doctrines of champerty and maintenance have been decriminalized and in most jurisdictions no longer fall foul of public policy considerations. TPF is now perceived as one of the key instruments to provide access to justice: In 2013, former President of the UK Supreme Court Lord Neuberger observed that funding is "the life-blood of the justice system" which "helps maintain our society as an inclusive one".

We are currently seeing the emergence of an ever-growing body of domestic legislation and regulation, e.g. in Hong Kong and Singapore, as well as rules of arbitral institutions, e.g. CAM-CCBC, CIETAC, HKIAC, ICSID (draft Rules), Milan Chamber of Arbitration and SIAC that acknowledge the existence of and the requirement for transparency regarding TPF. The presumption has now shifted – there remain only a few leading institutional rules that do not explicitly address TPF.

Provisions on TPF can also be found in recently-concluded international agreements such as the Comprehensive Economic and Trade Agreement (**CETA**) between Canada and the European Union, and soft law, e.g. 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

Consistent with this trend, the 2021 ICC Arbitration Rules expressly focus on TPF, thereby incorporating into the Rules what was earlier addressed in the ICC's various iterations of its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.

TPF Is Here to Stay

As the English Court of Appeal observed in the opening sentence of its seminal decision in *Excalibur v Texas Keystone*: "*Third party funding is a feature of modern litigation*." The incorporation of TPF into the 2021 ICC Rules – arguably the gold standard of arbitral institutional rules[fn]ICC tops most preferred arbitral institute chart (ICC News, 15 October 2015): "*Conducted by the Queen Mary University of London, the 2015 survey, Improvements and Innovations in International Arbitration, shows* ***ICC topping the chart of preferred institutions by a significant margin*** *and highlights* ***ICC's enduring footing as a leader in the field of arbitration*** *for over 10 years.*") (emphasis added).[/fn] – further elevates and confirms TPF as an integral part in the development of international dispute resolution. Eduardo Silva Romero, Co-Chair of Dechert's International Arbitration Global Practice, supports this development: "*The inclusion of provisions concerning TPF into the new ICC Rules recognizes funding's place in the international arbitration landscape.*"

Nothing Worthwhile Ever Comes Easy…

Funders can add significant value, whether they agree ultimately to fund a case or not. An established funder's decision-making is guided by a myriad of criteria including a case's prospects of success, the legal budget balanced against a likely awarded quantum and the expertise of counsel. In addition – when they are members of such funding associations – established funders need to uphold ethical and financial standards, for example, those prescribed by the 2018 Code of Conduct for Litigation Funders of the Association of Litigation Funders of England and Wales, and the Best Practice Principles of the International Legal Finance Association.

This often results in funders accepting only a minority of funding applications –

some 10% according to the 2018 ICCA-Queen Mary Task Force Report (consistent with the authors' experience). There is, therefore, a high threshold to overcome when seeking funding. Nonetheless, even if a funding application is declined, a funder's assessment can be more than worthwhile for lawyers and clients to obtain an independent assessment of a case.

In determining what cases to fund, funders often play the devil's advocate by stress-testing and subjecting a case to intense scrutiny. The purpose is to ensure it not only has reasonable to strong prospects of success, but that the proceeds can be recovered. Integral to this process is ensuring the lawyers have considered, as far as possible and practicable, the various contingencies and strategies that may arise throughout the life of a case. This in no way interferes with, however, the relationship and decision-making between clients and their lawyers, which remains firmly within their respective control.

This rigorous process is in stark contrast to the misperception that funders may incentivize and finance frivolous claims. On the contrary, established funders act as gatekeepers filtering out unfounded claims, thereby ensuring quality control of exclusively meritorious cases. This incidentally complements the ICC's renowned award scrutiny, albeit whereas a funder's assessment is done before agreeing to fund, the ICC reviews an award before it is notified to the parties. This book-ended process ensures, as far as possible, that successful claims are complemented by an enforceable award.

Funders Welcome Transparency

In line with the trend towards transparency in international arbitration, Art. 11(7) of the 2021 ICC Rules requires that parties "*must*" disclose the existence and identity of "*any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*".

Disclosure and transparency seek to avoid conflicts of interest between an arbitral tribunal and the parties (or any related parties, including funders), thereby ensuring the enforceability of an award. As concerns funders, this may extend to circumstances where e.g. an arbitrator is a shareholder of a funder, sits on its investment committee or otherwise has advised a funder during its due diligence

in a case that is, or may in the eyes of a party may be, related to the arbitration which she/he has been asked to determine.

The obligation to disclose is consistent with a funder's interest to protect its investment: avoiding conflicts of interest further assures a funder of a return on its investment via an enforceable award (if/when required to be enforced). Investing into an arbitration therefore incentivizes a funder to do all things necessary from the outset to comply with rules and best practices. The 2021 ICC Rules are another step towards allowing funders and parties to work together in a transparent manner, which builds further confidence into the arbitration framework.

Scope of Disclosure

At a time where TPF finds itself in the regulatory spotlight for both commercial arbitration and Investor-State Dispute Settlement (**ISDS**) (e.g. ICSID Rules reform), some stakeholders (notably states) are calling for more comprehensive disclosure obligations, including disclosure of the terms of a litigation funding agreement (**LFA**) (see e.g. discussions before UNCITRAL Working Group III on TPF in ISDS). This raises a multitude of issues.

Disclosure of the terms of an LFA may give an unfair advantage to an opposing party by revealing, for example, strategic and commercial considerations including the strengths and weaknesses of a case (from a funder's view). Unless specifically justified in the context of a particular case, there appears little to no good reason why such broad disclosure is required, let alone should become common practice in international dispute resolution. Even if required, protective measures such as the creation of a confidentiality club can serve to protect the parties' respective interests.

In this context, the 2021 ICC Rules – which require disclosure only of the existence and identity of the funder – strike a sound balance between the interests of transparency on the one hand, and confidentiality on the other.

Transparency Can Be a Two-Way Street

Art. 11(7) of the 2021 ICC Rules places the onus to disclose whether a party is

funded, on that party. This process may be assisted by having other stakeholders, in particular arbitrators, disclose from the outset and as a matter of practice their interest in any funder(s), whether or not at the time of such disclosure the existence and identity of a funder has been made known in the arbitration. The overarching purpose of such a proposed practice is, again, to avoid conflicts of interest throughout the life of an arbitration, to ensure no arbitrator risks any such conflict if e.g. a funder begins funding at a later stage in the proceedings, and to ensure the enforceability of an award.

Conclusion

Funders applaud the ICC for its measured and reasonable approach towards TPF in its 2021 Rules. This bodes well to strengthening TPF's place in the arbitration community, and overall to the evolution of arbitration as a reliable and robust dispute resolution system.