ICC ALBANIA
INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

#MondayArbitrationDay

Ms. Enisa Halili LL.M.

Associate with Freshfields Bruckhaus Deringer, Frankurt

THIRD-PARTY FUNDING AND THE 2021 ICC RULES

In recent years, third-party funding has gained increasing popularity in international arbitration. This blog post seeks to define third-party funding, provides an overview of some advantages and potential practical concerns. It then proceeds to address recent trends in institutional rules and in particular discuss the transparency and disclosure requirements for third-party funding in the 2021 ICC Arbitration Rules (the "2021 ICC Rules").

Definition of third-party funding

Third-party funding can be defined as an arrangement whereby a non-party entity provides financial support to a party in a dispute. The arrangement can cover part or all of the costs of the proceedings. Generally, funding will be provided in exchange for remuneration, which is either contingent on the outcome of the case or in return for a premium. Third-party funders are usually hedge funds, private equity firms, and specialised third-party funding companies.

Advantages of third-party funding

Third-party funding has become attractive as it enables parties to pursue their claims although they lack the financial means to do so. But third-party funding is not only for cash-strapped companies. Given that third-party funders will not be reimbursed if the claim is unsuccessful, the risk of an unfavourable outcome for parties with funding is mitigated. It is also suitable for companies that wish to reduce their legal costs or take these costs off their balance sheets. Third-party funders undertake a careful independent and objective case assessment before committing to a case, which can assist the funded party gain a better understanding of the strengths and weaknesses of its case.

Potential conflicts in relation to third party funding

While the mechanism of third-party funding can greatly facilitate dispute resolution proceedings, it also raises practical concerns such as the likelihood of conflicts of interest created by the repeated appointment of an arbitrator by the same funder. Factors that contribute to potential conflicts include, for instance, the increasing number of cases funded by third parties, the limited number of companies in the funding industry, as well as the close relationship between funders and certain law firms. Another concern is the effect third-party funding may also have on party autonomy, particularly in the context of a potential settlement, which may be subject to the funder's approval.

Recent trends in institutional rules and soft law

Third-party funding has become the subject of soft law and multiple institutional rules in recent years. The main issue being disclosure of the presence of a funding agreement. The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, for example, require disclosure of any third-party funders. In 2018, a joint task force between ICCA and Queen Mary University of London published a report that identified the issues that arise in relation to third-party funding in international arbitration and how those issues should be addressed.
Recent institutional rules have also reflected the development of third-party funding. Arbitral institutions including HKIAC, SIAC, SCC, the Milan Chamber of Arbitration, and ICSID (in the Proposals for Amendment to the ICSID Rules) have either updated their rules or issued separate guidance notes to address this matter.

Third-party funding in the 2021 ICC Rules

Prior to the adoption of the 2021 ICC Rules, the ICC had already addressed the disclosure of third-party funding in several documents.
In the 2015 report on Decisions on Costs in International Arbitration, the ICC did not contemplate a compulsory approach to the disclosure of third-party funding. Instead, arbitral tribunals had the discretion to discuss with parties whether the identity of third-party funders should be disclosed. In the same vein, an arbitral tribunal could also order disclosure of funding information if it believed that the third-party funding exists.

Several versions of the ICC Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration (the "ICC Guidance Note") have similarly hinted at a disclosure requirement. In the context of arbitrator independence and impartiality, the 2016 ICC Guidance Note stated that arbitrators should consider "*relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award*" when making disclosures.

The new ICC Rules, applicable to arbitrations registered on or after 1 January 2021, now impose a duty on parties to disclose the existence and identity of any third-party funders. The article reads as follows:

Article 11(7)

"In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration."

Although the disclosure of third-party funders is mandatory, its scope extends only to "the existence and identity" of any third-party funders and does not require the disclosure of more detailed information, such as the provisions of the funding agreements. It is noteworthy that the ICC adopts a rather broad definition of third-party funding, referring to it as "an arrangement for the funding of claims or defences and under which [a non-party] has an economic interest in the outcome of the arbitration" without specifying any contingency requirement or conditions of the

arrangement. However, the 2021 ICC Guidance Note does not shed much light on what could qualify as an "economic interest" beyond the situation where a non-party is entitled to "*all or part of the proceeds of the award*". Further, subject to a decision from the arbitral tribunal stating otherwise, the Guidance Note clarifies that the following circumstances would not normally fall within the scope of disclosure under Article 11(7): "*(i) inter-company funding within a group of companies, (ii) fee arrangements between a party and its counsel, or (iii) an indirect interest, such as that of a bank having granted a loan to the party in the ordinary course of its ongoing activities rather than specifically for the funding of the arbitration*".

Implications of Article 11(7) of the 2021 ICC Rules

The 2021 ICC Rules seek to strike a balance between transparency and the confidentiality and efficiency of the arbitral proceedings.
First, Article 11(7) imposes the disclosure of any third-party funding to the Secretariat, the arbitral tribunal and the other parties. Prompt disclosures by the parties will permit arbitrators to make timely assessments of, and decisions on, potential conflicts of interest. In the later stages of an arbitration, the disclosures will also shield arbitrators from challenges.

Second, the obligation to disclose third-party funding could raise confidentiality and efficiency concerns. For instance, an overly broad disclosure obligation pertaining to the terms of the funding agreement could allude to the strategic considerations of the case. By contrast, a more limited disclosure can preserve a party's case strategy, avoid frivolous challenges to arbitrators, and streamline arbitral proceedings. This balanced approach, adopted by the ICC and reflected in Article 11(7)'s requirement that only "*the existence and identity*" of the third-party funder be disclosed, is also in line with the best practices recommended by the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018).
Third, the disclosure of third-party funding may, however, also affect the ease with which arbitrations are administered. According to the 2017 Note to Parties and Arbitral Tribunals on ICC Compliance, parties could already be requested by the ICC to submit information concerning related entities (i.e. "*entities or individuals affiliated to a party in the matter*") to ensure compliance with international sanctions regimes and implement any necessary administrative measures. The compulsory disclosure of third-party funders now means that to the extent that a funder may be listed under an international sanctions regime, any applicable ICC compliance procedures would have to be implemented and complied with.
Finally, from the arbitral tribunal's perspective, the mandatory disclosure of third-party funders may alleviate money laundering concerns by clarifying the source of the funds involved in the arbitration, as well as entities or persons ultimately benefitting from the arbitral award.

Looking to the future

Cross-border disputes are expected to increase, whilst companies are faced with increasing financial restraints to pursue their

claims. Thus, the adoption of the disclosure rule by the ICC is of relevance as it sets up a regulatory framework for the operation of third-party funding mechanisms. The mandatory disclosure of the existence and identity of the third-party funder is a step towards greater transparency helping to maintain a balance between transparency, confidentiality and efficiency.

Disclaimer: The views and opinions expressed in this article are solely personal statements of the author and any errors are the author's own. They do not necessarily reflect the stance of ICC Albania. The content of the article is the original work of the author. The author takes the responsibility for any infringements of authorship.

Abbreviations:

ICCA - International Council of Commercial Arbitration
HKIAC - Honk Kong International Arbitration Center
SIAC- Singapore International Arbitration Centre
SCC- Arbitration Institute of the Stockholm Chamber of Commerce
ICSID- International Centre for Settlement of Investment Disputes

References:

The term "soft law" refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law.
2021 Arbitration Rules, ICC, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/
Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration (2016), ICC, https://www.iccspain.org/wp-content/uploads/2015/04/Note-to-Parties-and-Arbitral-Tribunals-on-the-Conduct-of-Arbitration-22-sept-2016.pdf
Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration (2021), ICC, https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/
Note to Parties and Arbitral Tribunals on ICC Compliance (2017), ICC, https://iccwbo.org/content/uploads/sites/3/2017/11/note-to-parties-and-arbitral-tribunals-on-icc-compliance-english.pdf
Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018), ICCA-Queen Mary Task Force, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf
How Can Third-Party Funding Help Businesses during the Pandemic? Noiana Marigo, Natalia Zibibbo, https://riskandcompliance.freshfields.com/post/102ge90/how-can-third-party-funding-help-businesses-during-the-pandemic
Third-Party Funding Finds its Place in the New ICC Rules, Jonathan Barnett, Lucas Macedo, Jacob Henze, http://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/
The Challenges of Sanctions for Arbitral Participants, Christopher Hunt, Colin Trehearne, Eriko Kadota, http://arbitrationblog.kluwerarbitration.com/2015/10/05/the-challenge-of-sanctions-for-arbitral-participants/
The Secretariat's Guide to ICC Arbitration, Jason Fry, Simon Greenberg, Francesca Mazza, ICC Publication 729 (Paris, 2012).
Third-Party Funding in International Arbitration, Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti, https://www.lexology.com/library/detail.aspxg=f0bf76ab-9607-4de0-92ee-70f9001277f5