Kluwer Arbitration Blog

# Access to Justice: Rebalancing the Third-Party Funding Equilibrium in Investment Treaty Arbitration

Ylli Dautaj (Assistant Editor for Investment Arbitration) (Penn State Law) and Bruno Gustafsson (Roschier Attorneys, Ltd.) · Saturday, November 18th, 2017

Third-party funding remains a hot topic in arbitration, which is understandable considering its complexity and that its accompanying issues often have major implications for arbitral procedure. This fall, the ICCA-Queen Mary Task Force on third-party funding in international arbitration released its "draft," touching upon a number of contemporary issues vis-á-vis third-party funding, all of which ought to be of high interest to practitioners, scholars, and students alike.

The third-party funding market exceeds billions of dollars and various actors are involved by way of funding, getting funded, and as brokers/intermediaries.[1)] One of the primary reasons for seeking third-party funding is the lack of "access to justice." In the context of third-party funding, "access to justice" refers to all tools and resources that implicate a party's opportunity to defend or enforce a legal right. In other words, lack of "access to justice" can be roughly equated to a lack of resources to litigate properly. Notwithstanding, this reason alone is changing and third-party funding is more and more being used by claimants to allocate risks and costs while continuing its business operations with a steady cash flow. However, with competition being the hallmark of the western economy, businesses being able to compete while simultaneously litigating for justice is ipso facto the essence of real "access to justice."

In "Gamblers, Loan Sharks & Third-Party Funders", Catherine Rogers wrote that investment arbitration has attracted funders' attention due to massive potential recoveries. However, she raised an important point in that critics are concerned that "significant new funding in investment arbitration cases will aggravate an already exploding caseload that creates a disproportionate burden on States." Although funders can, in theory, fund the respondent party, too, there is no real incentive to do so and "[f]or this reason, the arrival of third-party funders may well alter the entire landscape by significantly increasing the number of claims, as investors whose claims were considered too costly to pursue are able to obtain financing." Furthermore, she wrote that "[t]he resulting concern is that third-party funding will further distort perceived disparities in investment arbitration that favor investors over States." It can be said that Catherine was right in her analysis and most probably the near future will shed further light on the otherwise bullet-proof analysis.

This view makes it easy to overlook certain important features vis-á-vis access to justice, e.g. that some states might also lack sufficient expertise and resources to litigate properly, and thus "access justice." Two important issues come to mind. First, that the overwhelming majority of funding goes – either directly or indirectly – to the claimant, and perhaps reasonably so. Second, the decision of whether to fund or not is primarily based on the merits of the case, the benefit-cost analysis, and the enforceability of the award. It is in light of this latter calculus that a third-party funder, privileged with the expertise of well-known arbitration scholars and practitioners, could potentially weigh in a less developed country's lack of resources to prepare and litigate a case as a factor in its analysis. The calculus might culminate in, for example, that a less developed state would be more amenable to reach a quick settlement for an otherwise vexatious or frivolous claim.

On September 6, 2017, a new "investment support programme for the least developed countries" was released. The program is designed to provide a number of less developed countries (and there "under-resourced" law firms) with, among other things, advice and support in investment-related negotiations and to assist in dispute settlement, such as international arbitration.

It is true that third-party funding enhances the access to justice and that it is a good thing for the equality of arms and for the overreaching principles of procedural fairness and justice. However, less developed countries, too, have shortcomings vis-á-vis realizing real access to justice. If third-party funders do factor in the less developed states' resources, experience, and knowledge in its calculus (which is likely), it is with anticipation that we wait to see whether the investment support programme (or similar projects) will be a factor of consideration in the third-party funding calculus. If it does become so, it is a welcome feature in rebalancing the contemporary one-sided regime of third-party funding in investment treaty arbitration.

---

References

↑1 Chapter 3: “Litigation Funding in International Arbitration”, in Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35 (Kluwer Law International; 2016) p. 75-76.

This entry was posted on Saturday, November 18th, 2017 at 6:02 am and is filed under Arbitration, Investment Arbitration, ISDS, Third party funding
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.