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Old Issues, New Horizons: Third-Party Funding in Morocco

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Third-party funding has become a subject of major discussion over the past few years. It is clear that third-party funding is here to stay, and thus the question today is not whether it is going to grow, but rather where the opportunities are likely to be.

Third-party funding: Definition and objectives

Third-party funding is an arrangement between those who are party (or may be party) to contentious proceedings and funders who undertake to pay the legal costs of the proceedings, in return for a share of the proceeds, in the event the funded party's claims are successful and result in compensation. Third-party funders will therefore bear the financial risk of potentially unsuccessful claims, insufficient compensation, or even difficulties in enforcement. In addition, this mechanism concerns not only the claimant but also the respondent in the proceedings, which might eventually make well-founded counterclaims. The need for this financial solution increased substantially with the 2008 economic crisis, as seemingly worthy claims lacked funding due to the economic downturn.

Such funding mechanisms have become more and more common in arbitration proceedings, as they can give access to justice to claimants with meritorious claims but lacking sufficient financial resources. Third-party funding is particularly interesting for claimants in emerging economies, which play a major role in international commerce. The Kingdom of Morocco is a good example in which multinational companies regularly insert arbitration provisions in their transaction documents when dealing with small to mid-size companies, but may not always have the financial capacity to pursue costly, but meritorious claims.

Third-party funding in arbitration proceedings in Africa and Middle East: A lack of regulation

Many African and Middle Eastern countries do not have any prohibition against funding litigation and arbitration. Moreover, arbitration is more and more common in the continent as evidenced by the last ICSID Caseload Statistics, in which Middle Eastern and African countries represent no less than 26% of all the cases registered or administered by ICSID as of June 30, 2017, under the ICSID Convention and Additional Facility Rules.

More specifically regarding the use of third-party funding in arbitration proceedings, many international arbitral institutions around the world, such as the ICC in its Commission Report on Decisions in Costs in International Arbitration published in 2015, acknowledge this tool and have taken steps to promote its use. Regarding its regulation, many demand the implementation of at least some guidelines on the subject. In this context, a draft Report for Public Discussion of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration was published on September 1, 2017 and remained open for public comment until October 31, 2017.

The sole obstacle remaining could pertain to the regulation of the seat of arbitration. If the latter's legislation does not prohibit third-party funding, in the near future, regulation will come, inevitably, to eliminate malpractices that have already been witnessed in other jurisdictions. Concurrently, the Dubai International Financial Centre (DIFC) Court has been leading in this regard and has formally adopted a Practice Direction on March 14, 2017 (PD 2/2017) providing for the recognition of the legitimacy of funding arrangements. These developments bring legitimacy to third-party funding in arbitration proceedings, and will likely spark a renewed interest in favor of third-party funding in the region.

This is not the case in other countries within the region, and until this time comes, the playing field is untested and unexplored by funders. The good news is that, while some domestic laws limit or even prohibit third-party funding, for most African or Middle Eastern countries, third-party funding is not restricted by domestic legislation. For example, in the Kingdom of Morocco, funding may be provided by anyone and the arbitral tribunal has no ground to question the origin of the funding to the proceedings. While a codification of Moroccan arbitration laws is currently ongoing and at the consultation phase, some members of the Moroccan arbitration community are taking this opportunity in order to call for the recognition of third-party funding and the enshrinement of an adapted framework to enable this practice.

Third-party funding in Morocco: The growing opportunities

In Morocco, third-party funders will increasingly turn their attention towards arbitration. The lack of regulation discussed above is one of the reasons why third-party funding in arbitration, especially in Morocco, will be in the spotlight in the near future.

The Kingdom of Morocco is a contracting state to the New York Convention and is also one of the first countries that signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which entered into force in the country on June 10, 1967. The first ever arbitration claim administered by an ICSID tribunal was introduced against the Kingdom of Morocco in 1972 (Holiday Inns S.A. and others v. Morocco - ICSID Case No. ARB/72/1).

Moreover, investors can rely on more than fifty Bilateral Investment Treaties (BITs) signed by the North African state, currently into force, and providing for arbitration to settle the disputes arising between the country and foreign investors. There is also a notable evolution with respect to future cases from Morocco: the Kingdom is

becoming one of the most important investors in the African continent. Therefore, third-party funders should consider a foreseeable caseload coming from Moroccan investors in the continent. “[W]hen analyzing case law in Morocco we see that the Moroccan Courts are arbitration friendly”, according to Emmanuel Gaillard who spoke at the last Casablanca Arbitration Days of November 2017, sponsored by Casablanca Finance City (CFC), a financial and services hub set up by the Moroccan government.

The absence of regulation concerning third-party funding for the moment should not be seen as an impediment. To the contrary, as third-party funding in Morocco is not different from third-party funding elsewhere in the world, it should be seen as a fertile ground entirely exploitable to fund appealing claims. Therefore, now is the time to invest in Morocco, not only for equity investors, but also for third-party funders of arbitration cases searching for a gateway to the African market.

CFC can be a strategic host for third-party funders wishing to set foot in Africa and to conduct business in a country already investing economically and politically in the continent. CFC is particularly interesting because it has created a major ecosystem for international law firms, financial and services institutions and has already begun to rival other international financial centers for leadership, particularly as a source of investment in Africa.

As major progress has been made in regulating enforcement and arbitration, third-party funders have an opportunity and should be encouraged to embrace the emerging needs of funding for arbitration proceedings in the region. Not doing so would be wasting tremendous opportunities in a market recognized for its rapid growth for the past decade. In addition, the parallel developments endorsing the use of third-party funding for claims heard before the DIFC court also suggest that the use of funding will continue to grow in the region, providing increased opportunities for third-party funding in African and Middle Eastern markets.

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