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Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?

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On 1 September 2017, the ICCA QMUL Task Force on Third-Party Funding published its Draft Report for Public Discussion on Third-Party Funding in International Arbitration. The Task Force has developed principles with the aim of providing guidance to parties, counsel, arbitrators and national courts when facing third-party funding related issues arising in different contexts. Furthermore, and even more notably, the Task Force indicated that the report may be useful for regulatory bodies and arbitral institutions that seek to address issues relating to third-party funding in international arbitration.

It is undisputed that over the past years third-party funding has become increasingly popular in both international commercial and investment arbitration. This has given rise to a number of concerns and potential issues. Although third-party funding has a considerable upside - improving access to justice is an oft cited advantage - it also carries certain risks and challenges, for example, those relating to conflicts of interest, disclosure and (security for) costs. The recent expansion of third-party funding in international arbitration and ongoing debates on this topic have spurred notable developments with regard to its regulation, both on a national and an international level.

Latest developments in third-party funding regulation

Singapore

On 10 January 2017, the Singapore Parliament passed the Civil Law (Amendment) Act (Bill No. 38/2016), which entered into force in March 2017. The Act amends Singapore law to permit third-party funding for international arbitration and related court proceedings under certain conditions, with further regulations prescribing specific eligibility requirements for funders. Until then, third-party funding was prohibited in Singapore and currently, the funding of state court litigation is still restricted.

In anticipation of the newly adopted legislation in Singapore, the 2017 Investment Arbitration Rules (effective as of 1 January 2017) of the Singapore International Arbitration Centre (SIAC) grant an arbitral tribunal the power to order disclosure of the existence of a funding arrangement entered into by one of the parties to the

proceedings, the identity of the third-party funder involved and further details on the third-party funder's involvement and interest in the outcome of the case.

On 31 March 2017, SIAC also issued a Practice Note on Arbitrator Conduct in Cases Involving External Funding. This note includes standards of practice and conduct providing arbitrators with guidance on questions relating to independence and impartiality, disclosure and costs.

Hong Kong

Hong Kong has approved third-party funding of arbitrations seated in Hong Kong by adopting the Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Bill 2016 on 14 June 2017. This development is similar to the amendment of the law of Singapore, in the sense that the new national legislation aims at regulating previously prohibited third-party funding in international arbitration.

On 31 August 2017, the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC) released its Guidelines on Third Party Funding in Arbitration. These guidelines set out certain principles of practice and conduct which parties and arbitrators are encouraged to observe in respect of actual or anticipated arbitration proceedings administered by CIETAC in which there is or may be an element of third-party funding.

Hong Kong and Singapore are the first countries to explicitly regulate third-party funding in international arbitration on a state level. Although it should be stressed that the reason for this is strongly linked to the fact that prior to these legislative changes third-party funding of legal proceedings was altogether prohibited in these two states (based on the common law doctrines of maintenance and champerty), the new legislation does more than merely allowing third-party funding in prescribed cases. The new Singapore and Hong Kong laws make mandatory the disclosure of the existence of third-party funding and the identity of the funder involved. Such rules on a national level are entirely new in the world of arbitration.

Multilateral treaties and agreements

In the field of investment arbitration, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union dated 14 September 2016 contains explicit provisions on third-party funding. The Transatlantic Trade and Investment Partnership (TTIP), which is currently available in proposed form only, also includes rules on third-party funding. Finally, the International Centre for Settlement of Investment Disputes (ICSID) is currently working on a way to address third-party funding in arbitrations conducted under the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 2006.

Considering these recent developments in third-party funding in international arbitration, a broader trend towards regulating third-party funding may be expected for the near future.

The Netherlands: a good example of self-regulation?

In the Netherlands, third-party funding has gained traction over the past few years, both in court litigation as well as in (international) arbitration. There has been a notable increase of companies that specialise in the financing of claims entering the Dutch market. The Netherlands is considered an attractive jurisdiction for mass claim disputes. Cartel damage litigation has typically been an area where third-party funding is commonly used. Cases in which damages are suffered as a result of price fixing or abuse of a dominant position in the market by the accused party are attractive for third-party funders. In such cases, the relevant competition authority has usually already imposed a fine, which facilitates proving the damages suffered.

Dutch law does not explicitly address third-party funding. Although the Dutch Ministry of Justice has considered certain legal issues arising from third-party funding, it has not proposed any specific legislation in this regard. This means that (potential) issues arising from the involvement of a third-party funder are to be dealt with under the more general provisions of Dutch law. For example, a threat to the independence and impartiality of an arbitrator as a result of the involvement of a third-party funder with which arbitrator has some sort of relationship, should be addressed by the more general provisions on independence and impartiality of the arbitrator as can be found in the Dutch Code of Civil Procedure. Likewise, potential conflicts of interest between lawyers and their clients on the one hand, and the third-party funder on the other, are currently addressed through the general rules of conduct for lawyers.

The absence of specific regulation of third-party funding in the Netherlands has to our knowledge not led to any major issues in the Dutch legal practice up to this moment. In the very few published cases in which third-party (litigation) funding has been considered, the Dutch courts have dealt rather liberally with the issue, applying general legal principles. At least for now, there seems to be no need for specific regulation in the Netherlands.

To regulate or not to regulate?

The question remains whether further regulation of third-party funding would be a step in the right direction. While 71 per cent of the respondents to the 2015 Queen Mary International Arbitration survey believe that third-party funding is an area that requires further regulation, we are of the opinion that regulating third-party funding, at least on a national level, may not necessarily be the best way forward.

First of all, domestic rules and regulations are likely to be inconsistent among jurisdictions, opening the door to forum-shopping with parties selecting a governing law that is favourable or even silent on the matter. Second, there is a risk of over-regulating, thereby effectively restricting the use and application of third-party funding more than is necessary. Third, it is virtually impossible to address all issues and concerns with a single set of clear and binding rules; the issues associated with third-party funding may differ from case to case, from one jurisdiction to another and are bound to change over time, as will be the way in which third-party funding is practised and the way in which it is perceived. There is no 'one size fits all' and flexibility is key.

This leaves us with the roles arbitral institutions and international guidelines can play,

which in our view may be more effective in this context. Institutional arbitration rules have a broader applicability than domestic laws and are more specifically designed for the arbitral process. International guidelines are generally non-binding and offer greater flexibility. The 2014 IBA Guidelines on Conflicts of Interest were the first to address third-party funding to provide practitioners with guidance, and not without success. We would therefore propose not to opt for a highly fragmented system of national laws regulating third-party funding, but to further develop a set of non-binding guidelines on which practitioners can rely when being confronted with issues of third-party funding in international arbitration.

Finally, we should not forget that the ongoing debate on third-party funding has given rise to more awareness of its potential risks than ever before. As long as the key players in international arbitration – users, counsel, arbitrators and institutions alike – are conscious of the potential issues associated with third-party funding, they can act upon those. It may not be necessary to further regulate third-party funding if there is a common understanding thereof and generally accepted guidelines which can be relied upon in practice.

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