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Public Comment Period Now Open on Draft Report of the ICCA-Queen Mary Task Force on Third-Party Funding

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As the Co-Chairs of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (Task Force), we are pleased to announce that the draft report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration is now available for public comment until 31 October 2017. The draft report is available [here](#).

Overview of the Task Force

The Task Force is composed of over fifty members from over twenty different jurisdictions around the world, and includes representation of stakeholders from diverse perspectives, including arbitrators, in-house counsel, State parties, external counsel, representatives with experience at arbitral institutions, academics, and a range of third-party funders and brokers.

The Task Force aims generally to improve understanding about third-party funding through multi-lateral dialogue about the issues it raises in international arbitration, and to promote greater consistency in addressing these issues. In approaching these aims, the Task Force generally limited its work to those issues that: (1) directly affect international arbitration proceedings; and, (2) are capable of being addressed at an international level.

The current draft was assembled from several separate reports that were initially drafted by various Sub-Committees. Those reports and this Draft also benefitted from discussion at multiple roundtable meetings of the Task Force and comments submitted on the various Sub-Committee reports. The Co-Chairs are enormously grateful for all the hard work and careful deliberation of the Task Force Members in producing this Draft.

Overview of the Draft Report

In terms of the structure of this Draft Report, after Chapter One's general introduction and overview of the Task Force's work, Chapter Two provides an overview of the market and mechanics of third-party funding. It begins with an examination of the reasons parties seek funding, and the process funders use to evaluate whether to fund a dispute. It then provides a descriptive overview of the range of means for financing disputes, including both modern case-specific non-recourse funding and a range of other sources that serve similar functions.

Building on Chapter Two's overview of the forms of funding, Chapter Three then analyses the definition of third-party funding. Specifically, Chapter Three provides a broad working definition and examines different possible definitions, surveys the range of definitions that have been adopted by various other sources, and concludes by examining how different definitions affect analysis of different issues addressed in subsequent chapters.

Each of the three subsequent chapters addresses a specific substantive issue, and begins by articulating Principles for each of the following topics: Disclosure and Conflicts of Interest (Chapter 4), Privilege (Chapter 5), and Costs and Security for Costs (Chapter 6). The body of each of these chapters then delineates the sources and competing viewpoints the Task Force considered in reaching these Principles, as well as the reasons why particular viewpoints were eventually incorporated into the Principles instead of others.

Chapter Four addresses the issue of disclosure and potential arbitrator conflicts of interest. Consistent with other recent sources, the principle it articulates requires disclosure of the existence and identity of third-party funders to facilitate analysis of potential conflicts. In its current form, this Report includes proposed alternative versions of the Principles regarding disclosure in order to facilitate specific input regarding those issues for which there was disagreement on the Task Force.

Chapter Five addresses privilege. It provides a survey of national differences regarding privilege, which is supported by an Annex that collects national reports indicating how different jurisdictions treat it articulates an international principle regarding waiver of information that is otherwise determined to be subject to privilege. Specifically, it recommends that tribunals do not treat privilege as waived by virtue of information being shared with a third-party funder.

Chapter Six takes up the issue of costs and security for costs. It analyzes existing standards for granting costs and security for costs, concluding that the existence of funding is not generally relevant to such determinations.

Chapter Seven summarizes best practices for funding agreements. Task Force members generally agreed that a statement of existing best practices would be useful to new parties seeking funding, new funders entering the market, and the increasing number of arbitrators and counsel that are encountering funding for the first time.

Finally, Chapter Eight examines third-party funding in investment arbitration. The analysis in each of the foregoing chapters also analyzes the relevant issues as applicable to investment arbitration. This Chapter, however, seeks to provide additional discussion of both the policy issues that might affect application of the Principles in the Draft Report in investment arbitration, and a limited range of specialized issues that arise with respect to funding in investment arbitration.

The Public Comment Period

It is important to emphasize that this is a working draft. The Task Force continues to be actively engaged in its analysis, and for that reason we request that the Draft not be cited in publications. The Co-Chairs and Task Force look forward, however, to adding public feedback and comment to their continued reflections.

To that end, the Task Force has organized, or is cooperating with the organization of, a number of invitational and public discussions to facilitate discussion and feedback on the Draft during the public comment period. A list of events at which the Task Force's work and earlier drafts have

been or will be presented will be kept up to date [here](#).

During this public comment period, we also welcome direct feedback on the Draft, which can be submitted to the Task Force at the following address tpftaskforce@arbitration-icca.org. It is also possible to post public comments and view other public commentary [here](#). We note that this latter website is independent of ICCA, however comments submitted via this platform will also be forwarded to the Task Force.

Conclusion

The Task Force was established on the premise that meaningful and engaged dialogue can be of benefit to all. Dialogue alone will not necessarily generate consensus, but it can help identify more clearly areas of actual agreement and disagreement, sharpen focus and analysis, and help collectively distinguish between what are priorities and what is background noise.

The Task Force Co-Chairs look forward to receiving public feedback directly, and we hope such input will further advance the Task Force's work and understanding of the relevant issues.

Should you have any queries, please contact bureau@arbitration-icca.org.

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