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Third-Party Funding: Enforcement as a Cornerstone in the Funding Calculus

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Introduction

This short note briefly touches upon two enforcement issues pertaining to third-party funding in international arbitration, one more ventilated than the other. It is hoped that our comments on these issues will be perceived as an insightful contribution to an already ignited debate, with the caveat that we provide for a discussion rather than trying to settle an unsettled and partly unchartered territory. First, we shed light on a so far undiscussed "access to justice" issue—that is, when states hide behind the shield of sovereign immunity, and thereby indirectly and negatively affect the funding calculus.[1)] Second, we highlight the issue of enforcing funded awards in countries where the practice of external funding of arbitral claims is against the law.

Third-party funding plays an increasingly important role in international arbitration. The eminent Tribunal in *Giovanni Alemanni v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, opined as follows: "the practice [of third-party funding] is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection."(page 128) We agree, and the number of business entities involved in funding arbitration claims illustrates this point. The involvement comes from various actors, and the amounts of funding are in the millions and the possible rewards huge as well. These factors are illustrative of a new order where parties with limited liquid funds have recognized third-party funding as a dexterous – and in some cases vital – means to access justice. Simultaneously, salient entrepreneurs have discovered what has turned out to be a highly viable business model.

While the fierce emergence of third-party funding in international arbitration has hardly escaped any practitioner, the legal doctrine vis-à-vis third-party funding is still very much in its developing stage, and there is a significant number of important legal issues that may prove to play crucial roles in arbitral proceedings involving external funding around the world.

Execution issues affecting third-party funding in investor-state arbitration

"The acceptance and growth of third-party funding in common law jurisdictions has, in general, been driven by a desire to improve access to justice for the impecunious litigant."[2)] Third-party funding, in international arbitration, has also been perceived as a means of accessing justice. In this

latter context, “access to justice” refers to all tools and resources available to a party when defending or enforcing a legal right.[3] No doubt, third-party funding can promote equality of arms and enhance the overarching principles of procedural fairness and justice. However, the concepts are open-ended and invite all sorts of counter-arguments; however, for the purposes of this brief note, we assume that the right to litigate is a way of accessing justice.

When the third-party funder decides – “calculates” – whether to fund or not, the funder is primarily focusing on: (1) the merits of the case, (2) the benefit-cost analysis (quantum), and (3) the enforceability of the award, including execution. It is in light of this calculus that a third-party funder, well-aware of the execution intricacies in light of sovereign immunity, factors in the history of non-complying states, and decides that an otherwise strong case on the merits and quantum may, nevertheless, fall short of funding due to a potential impossibility in executing the assets. In short, an investor that might need to litigate, and might even have a meritorious claim, might still not get funding because “rogue states” have a history of hiding behind the shield of sovereign immunity, and thus hindering their “access to justice.” This is not purely a question of litigation, but also one of leverage in settlement negotiations.

The difficulty vis-á-vis sovereign immunity and the execution of ITA awards arise from the intersection (and distinction) between waivers of immunity from jurisdiction, on the one hand, and waivers of immunity with respect to execution, on the other hand.[4] “The result is that the holder of an unpaid ICSID Convention award can seek enforcement in the courts of any ICSID Convention country, but its ability to recover will be limited by municipal laws on sovereign immunity.”[5]

The question of sovereign immunity is an important one in selecting the forum for enforcement in cases being brought against a State or a governmental agency.[6] When a state invokes sovereign immunity vis-á-vis located assets, the investor is left in the dark, trying to locate commercial assets and often leaving no stone unturned. However, this is costly and time-consuming. In this respect, Professor. Schreuer opined that:

> “[A]llowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs.”[7]

This is probably a risky situation that a third-party funder might want to avoid, unless they are funding for enforcement purposes (either alone or in conjunction with the arbitration). States that misuse or abuse sovereign immunity can, therefore, hinder investors from “accessing justice” by way of getting funding, thus preventing the investors from realizing assets. Of course, this discussion is fundamentally based on the idea that third-party funding is at all an important or welcomed aspect of investor-state arbitration. Another argument can also be made that it should not be a feature of investor-state arbitration, as opposed to international commercial arbitration.

Enforcing third-party funded awards and public policy

A number of important risks related to the recognition and enforcement of funded arbitral awards

were raised by Ben Knowles and Paul Baker in “Enforcing a funded award in an anti-funding environment.”[8] Focus in the article was directed on enforcement of awards rendered in arbitrations involving third-party funders in countries where funding is impermissible. It cannot be ruled out that courts in such countries develop a tendency to refuse enforcement of funded awards. As for countries bound by the New York Convention, the question ought to be raised whether such an action would even be allowed. The authors of the mentioned article emphasize the valid point that signatory countries may not refuse enforcement of arbitral awards, save upon a few narrow grounds. The only potentially applicable ground that could merit such refusal of enforcement is public policy, and it remains to be seen whether any of the countries engaging in skepticism towards third-party funding will develop any case law in this regard. In our opinion, the worldwide increase of third-party funded arbitrations is unlikely to stagnate any time soon, and as the practice becomes an increasingly natural feature of international arbitration proceedings, it would seem reasonable that states act accordingly by refraining from unwarranted counteracting measures.

Concluding Remarks

By hiding behind sovereign immunity and complicating the realization of assets, rogue states are not only affecting the enforcement (and execution) stage but, due to the need for litigation funding, perhaps also the investor’s access to justice. Maybe it is time to look into some of Professor Bjorklund’s proposed amendments regarding issues with sovereign immunity once again, viz., making changes to (1) international laws; (2) domestic laws; and (3) asking home states for assistance and perhaps multilateral pressure.[9]

We think that third-party funding is here to stay, that domestic public policy should not be used to denounce a transnationally accepted practice. It is hoped that this area of arbitration will not be one were scholars and practitioners will be left in the dark, arguing in the abstract, with the former promoting ethics and the latter hiding behind “freedom of contract” to remain untouched and unknown. A consensus has to be reached, primarily one that strikes a fair balance between – but never infringes on – business efficiency and good lawyerly conduct.

References

?1 See 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. 101, discussing why investor-state arbitration cases may be more attractive for a funder than commercial ones, e.g. because of the ability to demand higher costs for capital provided due to special legal and financial expertise, such as in enforcement and vis-á-vis obstacles pertaining to sovereign immunity.

?2 Jonathan Wood and Daniel Hemming, ‘Third-Party Funding of Litigation: A Perspective on the International Landscape’ (Who’s Who Legal, 2014)

?3 See 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) pp. 75-76.

?4 Andrea K. Bjorklund, Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes, 217.

?5 Ibid 211.

?6 Redfern, Alan and Hunter, Martin, International Arbitration (Oxford University Press 2009), 629.

?7 Christopher Schreuer, ”State Immunity: Some Recent Developments (1998), 125.

?8 Global Arbitration Review, “Enforcing a funded award in an anti-funding environment” (19 August 2017).

?9 See Andrea K. Bjorklund, Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes.

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