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Expansion and Regulation on the Horizon for Third-Party Funding in Ireland and the EU

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Several recent developments across the EU portend increased availability of third-party funding by parties to EU-seated arbitral proceedings, albeit within a context of regulation of that funding beyond the self-regulatory approach of funder codes of conduct or the rules of funder organizations.

Legalisation of Third-Party Funding of International Arbitration in Ireland

Ireland, the only common law jurisdiction in the EU, has until recently been an outlier in the common law world by prohibiting third-party funding for either litigation or arbitration. This was on the basis of the historic rules against maintenance (a third party unconnected to the litigation assisting to maintain it through, for example, financial assistance) and champerty (a form of maintenance, whereby the third party pays some or all of the litigation costs in return for a share of the proceeds). However, on 5 July 2023, the Courts and Civil Law (Miscellaneous Provisions) Act 2023 was signed into law and section 124 of the same sets out an amendment to the Arbitration Act 2010, providing that maintenance and champerty do not apply to "dispute resolution proceedings".

Because the amendment has only been made to the Arbitration Act 2010, the definition of "dispute resolution proceedings", while broad, only covers arbitrations or other forms of dispute resolution proceedings that arise out of, or are in connection with, international commercial arbitration. The definition applies to:

> (a) an international commercial arbitration; (b) any proceedings arising out of an international commercial arbitration before a court of competent jurisdiction performing any of the functions provided for in the Model Law; (c) any appeal from a decision of a court referred to in paragraph (b); (d) any mediation or conciliation proceedings arising out of an international commercial arbitration, proceedings or an appeal referred to in paragraph (a), (b) or (c).

These changes are due to be commenced shortly through Ministerial Order.

The amendment is the first step in removing champerty and maintenance within Ireland but does

not extend to Irish litigation. It legalises third-party funding for arbitration and arbitration-related dispute resolution proceedings, but it is unclear, as yet, whether the amendment could open doors not just for third-party funding, but also for other arrangements like success fees by law firms. Importantly, the amendment seeks only to legalise funding, not to regulate the provision of funding or third-party funders operating within the jurisdiction.

Proposed EU Directive on Third-Party Funding

However, this development sits within a wider context of increased use of third-party funding in the EU and the Irish government's awareness that EU regulation of third-party funding and funders (to which Ireland will have to give effect) is fast-approaching. Indeed, on 13 September 2022, the European Parliament passed a Resolution with recommendations to the Commission on Responsible private funding of litigation. The Resolution noted that there are at least 45 third-party funders operating in the EU. The Resolution observed in its Introduction (para. 1) that "although recourse to third party litigation funding is still limited, it is an expanding practice in the Union, which plays an increasing role in the justice systems of some Member States". It contained a proposed Directive on the regulation of third-party funding and also appeared to be intended to apply to arbitrations seated in the EU (according to the definition of "proceedings" in Article 3(e) of the proposed Directive).

The proposal was significant as the first EU-wide regulation of third-party funding and it contained a number of notable features:

- An authorisation system for third-party funders;
- Minimum standards in terms of independence, transparency, governance and capital adequacy (including empowering national supervisory authorities to verify whether litigation funders would be able to maintain access at all times to the minimum liquidity required to pay in full all foreseeable adverse costs in all proceedings they have funded);
- A fiduciary duty of care to act in the best interests of a claimant and to avoid conflicts of interest;
- A ban on withdrawal of funding during the proceedings subject to prescribed circumstances under national law;
- Member State courts being empowered to make adverse costs orders against litigation funders, whether jointly or severally, following an unsuccessful outcome; and
- A cap on the percentage of the gross settlement or damages payable to third-party funders of up to but less than 40%.

The proposed Directive contained a number of areas of uncertainty from an arbitration perspective, including the fact that it did not explicitly address how funders would be made liable for adverse costs awards in an arbitration context where funders are not party to the arbitration and not subject to the tribunal's jurisdiction. Many of the features were unpopular with the third-party funding industry for both litigation and arbitration and there was a general feeling of inadequate engagement with the sector before putting forward the proposal. In the interim, and in what has been welcomed by the sector, the Commission has undertaken an independent mapping study. This is aimed at collecting and analysing information on the legal framework and practical operation of third-party litigation funding in the EU Member States and in selected third countries.

Across the EU, there are numerous different approaches to third-party funding and wider forms of

funding, including success fees offered by law firms. Some states have implemented a clear legal regime covering one or both. For instance, in France, third-party funding is permitted, as are success fees, provided that the amount is reasonable (no percentage limit is set) and that the part of the fee arrangement which is set based on work performed – be it hourly rate or fixed fee – is not "derisory". In Germany, third-party funding is permitted but success fees are prohibited subject to limited exceptions involving low-value claims. In Spain, there is no restriction on third-party funding or success fees which are freely allowed, further to a Supreme Court decision in 2008. Conversely, other states provide no legislative framework at all. Some have focused on allowing funding and success fees for arbitration, while others have opened up the wider dispute resolution market. What is clear is that both third-party funding and success fee arrangements are on the rise. Countries like Spain, which permits both third-party funding and contingency and conditional fee arrangements, are seeing a thriving market and demand from clients.

However, very few countries have introduced any specific regulation of the third-party funding industry. This is not, of itself, problematic; the UK has a thriving third-party funding market and no specific legal regulation of the third-party funding industry, relying on self-regulation through a voluntary code of conduct. Whether the EU's proposals to regulate come to fruition and whether other countries, including the UK, will decide to regulate in future, remains to be seen.

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