Third-Party Funding in International Arbitration – A Menace or Panacea?

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As its Council Member I attended the ICC Institute of World Business Law's 32nd annual meeting on 'Third-Party Funding in International Arbitration' held in Paris on 26 November 2012. It was a grand success as it drew many professionals, arbitrators, experts, academic specialists and, above all, representatives from some major third-party funding bodies such as Burford Group Ltd., Calunius Capital LLP, Fulbrook Management LLC and others, and the discussion and debates generated a great deal of interest among the participants. The presented topics ranged from the concepts of litigation and arbitration financing to more complicated issues such as ethical issues of third-party funding (TPF), due diligence and decision making process in investing in claims by third parties, conflict of interests for arbitrators / counsel, arbitrator's independence and impartiality, confidentiality and disclosure of TPF and the problems of TPF in investor-State arbitration. The purpose of this blog is to highlight some of the burning issues passionately debated in the meeting. Following the Chatham House Rule the views express herein will not be specifically attributed to any individual or organization.

One of the issues debated was the concept and nature of TPF itself. As the concept is ever evolving in recent years in the field of arbitration, the participants' views did not seem to point to a consensus on a fixed definition of TPF. However, certain existing models in practice were articulated in the discussion. The notion of third-party litigation financing (in a broad sense) is not new as it has been in practice in the USA for more than a century now (i.e. contingency fee arrangement), though in Europe it is relatively a new phenomenon and fragmented in practice (e.g. conditional fee arrangement is permitted in England; pure contingency fee arrangement is permitted in Italy while it being prohibited in England and in many other countries in Europe such as France, Switzerland, Sweden and Spain). In the field of arbitration TPF is recently emerging as an attractive option facilitating access to justice to an impecunious party who may have a credible / meritorious claim. Arbitration finance is a specialty corporate finance focused on arbitration claims (i.e. the award proceeds) as assets being used as collateral to obtain such finance which is a non-recourse one. The reward or return of the third-party funder is said to be determined on a case-by-case basis. Normally, a percentage of the damages ranging from 20 percent to 40 percent or a cost multiple, usually running from two to four, or a combination of these is applied to determine the third-party funder's return. Some participants expressed various ideas around the concept of TPF such as third-party funder's buying equity interest in the claim or a share in the proceeds of a prospective arbitral award, or a joint venture (in the sense of equity joint venture, i.e. by monitizing the claim) arrangement between the client and the third-party funder. As opposed to the aforementioned narrow connotation to TPF, others tended to suggest a broad one encompassing also other contracts as "derivatives" such as contingency fees arrangements between a client and counsel and insurance contracts (e.g. for adverse costs), etc. Some third-party funders indicated that TPF, in time, might evolve into complex financial engineering (e.g. credit default swaps) involving other related financial products, but it remains to be seen as the market develops and demand grows in the years ahead. The third-party financing is an investment per se in arbitration (albeit a high-risk investment) to be described as a portfolio investment rather than direct. Both claimants and respondents can take the advantage of TPF at any stage during the arbitration proceedings and beyond, i.e. at the stage of the enforcement of the various issues were raised as to the nature (i.e. whether mandatory or voluntary disclosure) and the extent of disclosure (i.e. whether of the mere existence of a third-party funding arrangement or of the actual funding agreement), to whom to disclose (whether to the arbitral tribunal and / or to all the parties and stakeholders involved) and the time to disclose (before or at the beginning of the arbitration, or at some point in the arbitral proceedings)[See on the issue of timing of TPF impacting ICSID jurisdiction in a most recent case: *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1(Decision on Jurisdiction, December 21, 2012, paras. 239-259), including Dr Kamal Hossain's Separate Opinion, paras. 34-37] It was felt that the representatives of the third-party funding companies present were not in favour of an extensive disclosure of the terms and conditions whatever might have been agreed between the third-party funder and its client as in many respects confidentiality rules apply for various reasons (including the sensitive nature of information, or matters involved may be concerned with the economics of the deal, etc.) and in their view no question of mandatory disclosure should arise, let alone the fact that there does not exist so far on the international level any established rules requiring such disclosure. Some participants felt that in some situations there may be a need for disclosure in good faith, otherwise it would lead to the breach of procedural good faith. When some participant questioned as to why third-party funders are 'secretive about disclosure' to which a funder representative retorted by saying that it is preferable to use the expression 'cautious about disclosure' to better reflect the state of affairs. According to third-party funders, if for any reason the conflict of interests, transparency, adverse costs, or security for costs is in issue, or a settlement is being discussed, only limited disclosure of third-party funding is tolerable.

One of the important issues discussed concerned TPF in the context of investor-State arbitration. Thus, as a recipient of TPF a State party may have its sovereign authority issues or political implications as a third-party funder may exercise control over the dispute strategy and management whilst the former may have little or no control as it may have to submit to the whims and considerations of the third-party, often contrary to the State's public policy. There could also be the possibility of the state's regulatory or nationalization measures being attributed to the interest of the third- party funder which might not be unusual though in the case of some corrupt governments. Thus, there could be issues of public policy, transparency and the State's accountability to the public when the relationship between the State and the third-party funder may not be perceived as level playing because of the overbearing control