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An Overview of Third-Party Funding in the 2021 ICC Arbitration Rules

The 2021 Arbitration Rules of the International Chamber of Commerce (“ICC”) entered into force on 1 January 2021, introducing new measures in an effort to maintain a more transparent arbitration environment by ensuring the independence and impartiality of arbitral tribunals.



One of these measures includes the disclosure of third-party funding (“**TPF**”) arrangements to the ICC Secretariat, arbitral tribunal, and other parties, as Article 11(7) of the 2021 ICC Arbitration Rules reads “...each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims of defences and under which it has an economic interest in the outcome of the arbitration.”¹

In this article, we will introduce you to the concept of TPF and discuss the arguments in favor of and against its use in the, to some extent, revolutionary new regulation.

The Concept and its Historical Background

The origins of TPF interestingly date back to the Middle Ages in England where wealthy nobles supported parties in litigation by providing funds independent of the merits of the case in order to stay ahead of their competitors and to offer a source of revenue.² Afterwards, such practices were strictly prohibited for violating the doctrine of “providing financial assistance to a party to a dispute without taking an interest in the outcome and without an expectation of receiving a share of that party’s recovery.”³ Over time, this doctrine has been decriminalized, and in most jurisdictions, no longer falls within the scope of public policy considerations.⁴

Although TPF is not a new concept, no unanimous definition for what constitutes TPF has been adopted as of yet. However, several institutions have already defined this concept and acknowledged its existence. For instance, Article 8.1, Section A of the Comprehensive and Economic Trade Agreement (“**CETA**”)⁵ has defined TPF as “any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings

either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.” In addition, the Explanation to the General Standard 6(b) of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) states that “the term ‘third-party funder’ refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party, for, the award to be rendered in arbitration.” In light of these definitions, TPF can be defined as a system by which one of the parties’ arbitration costs is financed through a third-party (bank, hedge fund, insurance company, or any other entity or individual that funds the case as a part of their investment) to the arbitration proceedings, partially or completely, on the condition of receiving remuneration if the case is successful. It is worth noting that even though Turkish legislation, including the Turkish Civil Code of Procedure⁶ and the Turkish International Arbitration Law,⁷ does not include a definition of TPF, no obstacle exists for its use in Turkey as long as the lending relationship is in compliance with the financial legislation, even if there is no well-established practice yet. With the new amendment, the 2021 ICC Arbitration Rules join the few regulations that expressly regulate TPF, alongside CETA, the IBA Guidelines on Conflicts of Interest in International Arbitration, the Arbitration Rules of the Milan Chamber of Arbitration, and the Investment Arbitration Rules of the Singapore International Arbitration Center.

The Scope of TPF Disclosures under the 2021 ICC Arbitration Rules

As per the newly added paragraph (7) to Article 11 of the 2021 ICC Arbitration Rules, a third-party funder is identified as a “non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration,” and parties must inform “the

Secretariat, the arbitral tribunal and the other parties” of “the existence and identity” of the third-party funder’s existence.

The reason behind this provision is “to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3).” Articles 11(2) and 11(3) regulate the arbitrators’ duty to disclose any facts or circumstances concerning the arbitrator’s impartiality or independence. Thereby, this provision serves the purpose of precluding any possible conflicts of interest between the arbitrators and the funded party by obliging the funded party to disclose the TPF arrangement.

Furthermore, Article 11(7) mandates that such disclosure must be made to “the Secretariat, the arbitral tribunal and the other parties” in order to ensure that any party that may challenge an arbitrator does so as soon as possible and the disclosure shall be made in a prompt manner for the arbitral tribunal to be immediately constituted.

Finally, the scope of disclosure has been limited to “the existence and identity” of the third-party funder. The wording of the provision clearly does not order the funded party to provide the funding agreement as a whole in order to avoid any confidentiality concerns of the funded party as the identity of the third-party funder shall suffice to determine any possible conflicts with the arbitrators.

Benefits of disclosing TPF in Accordance with the 2021 ICC Arbitration Rules

An impartial and independent arbitral tribunal is undoubtedly one of the most fundamental elements of a transparent arbitration environment. Impartiality means that the “arbitrator should not privilege one party and should not have any prejudgment regarding the question in dispute,” whereas independence means that “the arbitrator should not have any actual or past dependent relationship with

1 ICC 2021 Arbitration Rules, last accessed on 29 March 2021, at <<<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>>>

2 Osmanoğlu, Burcu, Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest, *Kluwer Law Int'l* 2015; 21/3, 2015, page 325 - 250.

3 Goldsmith Aren et al, Third-Party Funding in International Arbitration: Everything you wanted to know (but were afraid to ask), *Int'l Bus. L.J.* 53, 2012.

4 Nieuwveld, Lisa Bench et al, Third-Party Funding in International Arbitration, *Kluwer Law Int'l*, 2012.

5 CETA is a free-trade agreement between Canada, the European Union, and its member states, eliminating 98% of the tariffs between Canada and the EU.

6 Official Gazette 27836 4 February 2011.

7 Official Gazette 24453 5 July 2001.

the parties of a nature to influence the arbitrator's judgment freedom.⁸ Nearly all arbitration laws and rules⁹ clearly make reference to how a lack of impartiality and independence may lead to a challenge and/or removal of the arbitrator for endangering the valid constitution of the tribunal as well as the challenge, which may result in the setting aside or unenforceability of the award.

If an arbitrator has an ongoing or previous relationship with the disclosed funder of a party, the arbitrator will have the duty to disclose this potential conflict pursuant to Article 11(2) or 11(3) of the 2021 ICC Arbitration Rules, depending on the time of the disclosure. Disclosure can help prevent potential conflicts of interest arising late in the process and will ensure full transparency. Therefore, the new Article 11(7) adopted by the ICC prevents arbitrators from stepping down after a significant part of the arbitration has already been completed by avoiding late acknowledgment of the TPF, and thus, aims to achieve greater time efficiency. Disclosure of TPF also mitigates the risk of challenges to or the unenforceability of an award, thereby setting a barrier for court intervention and public repercussion.

While it is a fact that TPF assists individuals with no financial means to pursue their claims against wealthy defendants and is used as a tool for parties to access justice equivalently, third-party funders are merely investors expecting a return. Depending on the agreement between the third-party funder and the funded party, the funder may retain constant control over the claimant's case strategy, give directions, select counsel for the representation, and even lead the proceeding on its own behind the scene. This may impact the procedural flow of the arbitral proceeding as internal disagreements over strategy may delay the proceedings and increase the costs that the parties will be required to cover in the end.¹⁰ However, when TPF is disclosed, the arbitral tribunal will be able to better assess the conduct of the parties and any outside influencers in order to prevent expensive procedural delays.

Finally, the presence of a third-party funder is a strong indicator that the losing party will not be able to afford the winning party's costs. Accordingly, knowing a funder's involvement will guide each party in the dispute to decide whether to seek security for costs. For example, in an arbitration case heard by an ICSID tribunal, a respondent requested security for costs claiming that the claimant would not be able to cover the costs rendered against it since it was in a difficult financial situation and was being funded by a third-party. The tribunal considered these aspects and ordered the claimant to pay security for costs in the form of an irrevocable bank guarantee.¹¹ This award depicts a direct correlation between the presence of TPF and ordering security for costs. Arbitrators may render more grounded awards if they are aware of the existence of a TPF arrangement. In light of the above, it can be concluded that disclosure of a TPF arrangement will likely be welcomed from various perspectives.

Possible drawbacks of disclosing TPF in accordance with the 2021 ICC Arbitration Rules

Even though the wording of Article 11(7) of the 2021 ICC Arbitration Rules only requires parties to inform the Secretariat, the arbitral tribunal, and the other parties regarding of mere existence of a third-party arrangement, the assessment of potential conflicts of interest may make it necessary to consider the exact terms of the funding agreement as a whole by the arbitral tribunal or by the court at the time of setting aside proceedings. This will give rise to confidentiality issues not only for the funded party but even from the funder's perspective. Funders might be worried that the tribunal will adversely impose some or all of the proceeding's cost on the funded party, so knowledge of the funder's economic support may shape the behavior of the counter party during the proceedings. Finally, the funder may be concerned with its public image if the party it funds is found to have operated below the standards of business, ethical, or human right practices.¹²

In the case Waterhouse v. Contractors Bonding Limited, after discovering that the claimant had obtained litigation funding, the respondent requested full disclosure of the litigation funding agreement. The High Court of Auckland ordered disclosure of the litigation funding agreement for its own inspection, and subsequently, found nothing in the agreement warranting its disclosure. Yet, the Supreme Court of New Zealand requested disclosure of the details of the funding agreement to the non-funded party to clarify whether this agreement gives rise to an abuse of process. Waterhouse v. Contractors Bonding Limited, Supreme Court of New Zealand, Judgment of 20 September 2013, NZSC 89, para. 6 last accessed on 29 March 2021 at <<<https://www.courtsofnz.govt.nz/assets/cases/2013/sc-66-2012-waterhouse-v-contractors-bonding.pdf>>>.

Ultimately, even though the aforementioned provision obliges the parties to disclose TPF by inserting the term "must" into its wording, there is still a risk that the funded party may not perform its obligation to inform and could hide the TPF relationship. Therefore, the enforcement of this provision is left at the parties' discretion and good faith since there is no inspection mechanism to prove otherwise. Thus, this regulation may not be sufficient to ensure independence and impartiality of the arbitral tribunal on its own and may not provide the expected utility. However, we envisage that this new provision will strengthen TPF's place in the arbitration community and the evolution of arbitration as a more transparent dispute resolution mechanism.

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⁸ Julian D.M. Law, Loukas A. Mistelis & Stefan Michale Kröll, Comparative International Commercial Arbitration, Kluwer Law Int'l, 2003.

⁹ Article 14 of the 2021 ICC Arbitration Rules, Article 10(3) of the LCIA Arbitration Rules, Article V(d) of the New York Convention.

¹⁰ Shaw, Gary J., Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit, Arbitration International, 2016, page 1-12.

¹¹ RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, last accessed on 29 March 2021 at <<<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/10>>>

¹² Shaw, supra note 10, page 7.

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