Afterword

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Across the spectrum, third-party funding is increasingly being perceived as a legitimate, economically prudent tool in the modern administration of justice. Gone are the days of pejorative associations with champerty, maintenance, and barratry – at least in many key jurisdictions[1] and the international arbitration realm. At the heart of the common law doctrine of champerty is the imperative to prevent the prosecution of abusive, dishonest, malicious, or frivolous claims. Frivolity is in many respects anathema to contemporary litigation and arbitration finance, where the merits of cases tend to be scrutinized thoroughly before funding is granted. The very premise of third-party funding is now to enhance or, to use the terms of the English Court of Appeal in *Arkin v. Borchard Lines*, to "facilitate" access to justice.[2] More recently, the Court of Appeal noted in *Excalibur Ventures v. Texas Keystone* that third-party funding activities "promote the due administration of justice."[3]

Yet, there is no altruism in third-party funding. Funders are there for the return on investment from the proceeds of funded cases. In a world of negative interest rates, the returns can be quite rewarding notwithstanding the attendant risks of the binary adjudication processes of litigation or arbitration.[4] The pursuit of profit is not incongruent with access to justice, however. After all, counsel and arbitrators are – by virtue of the very nature of their practices – investors and businesspeople.

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1 Ireland is a notable exception, *see* the Irish Supreme Court's recent decision in *Persona Digital Telephony Limited et al. v. The Minister for Public Enterprise et al.* [2016] IESCDET 106.

2 *Arkin v. Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 ¶ 40.

3 *Excalibur Ventures LLC v. Texas Keystone Inc et al.* [2016] EWCA Civ 1144 ¶ 31.

4 Bloomberg, *Litigation Finance Finds Its Feet Targeting Returns Up To 20%* (October 30, 2020), https://www.bloomberg.com/news/articles/2020-10-30/lawsuits-attract-investors-hunting-windfalls-in-low-yield-era.

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The economic rationale for third-party funding is especially pertinent in times of crises such as the present one. The ravages of Covid-19 will likely mean that fewer users will be able to resort to dispute resolution to seek justice. Risk-sensitive users, or those facing liquidity or solvency difficulties, will undoubtedly drive demand for funding. For these very economic, acyclical reasons, third-party funding is here to stay. Why then does it stir such vehement debates?

Its projection onto the mainstream, and quest for legitimacy, is not without pitfalls. Legitimacy is synonymous with transparency. It is no longer tenable for the fact of third-party funding to remain in the dark. This is the first of the principles regarding disclosure and conflicts of interest set out in the 2018 ICCA Report, and it reflects a consensus within the arbitral community in that regard.[5] Although nonfunded parties should be entitled to ensure, to the extent possible and necessary, that impecunious claimants will satisfy any adverse cost awards, the difficulty is that, once the fact of funding comes to light, nonfunded parties can exploit that fact to fuel guerrilla tactics – which taint many arbitrations, unfortunately.

Tribunals have a myriad of tools at their disposal to censure guerrilla tactics, ensure the fair and efficient conduct of proceedings, and allow both parties to access justice. Indeed, the risk of potential guerrilla tactics that are specific to funding arrangements does not outweigh the other, more systemic, risk of opacity. Conflicts of interest are the obvious concern here. Third-party funders are now part of the arbitration community – there can be no doubt that they are integral members of it. Users, law firms, arbitrators engage systematically with funders in various capacities. A user may have a direct or indirect financial or other interest in a funder, a law firm may provide a merits review or other advice to a funder, an arbitrator may serve on a funder's advisory or investment board, etc. These are all situations that can raise potential conflicts of interest, which can only be addressed through appropriate disclosures.

In investor-state dispute settlement – a system facing legitimacy questions of its own and the subject of an increasingly politicized public debate – such conflicts could potentially compromise the integrity of the process. It is no surprise, then, that third-party funding is addressed in the SIAC Investment Arbitration Rules,[6]

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[5] *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* 14 (ICCA Reports No. 4, April 2018) (Principle A.1: "A party and/or its representative should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.").

[6] *See* SIAC Investment Arbitration Rules rr. 24.1, 33.1 (January 1, 2017).

current working papers of the next iteration of the ICSID Arbitration Rules,[7] and the ICSID/UNCITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement,[8] to name but a few instruments. Nor is it a surprise that third-party funding features in recently negotiated investment treaties such as the 2018 EU-Singapore Investment Protection Agreement[9] and the 2019 EU-Vietnam Investment Protection Agreement.[10]

By the same token, because funders are now integral members of the dispute resolution community, they are increasingly expected to act in a manner that is consistent with that community's principles and values – and rightly so. The Association of Litigation Funders' 2018 Code of Conduct for Litigation Funders is

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7 *See* Proposals for Amendment of the ICSID Rules (Working Paper No. 4, February 2020), Arbitration Rules for ICSID Convention Proceedings (Arbitration Rules), r. 14 ("(1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ('third-party funding'). (2) A non-party referred to in paragraph (1) does not include a representative of a party. (3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice. …"); *see also* r. 53(3) (" In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including: (a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties. (4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3). The existence of third-party funding may form part of such evidence but is not by itself sufficient to justify an order for security for costs.").

8 ICSID/UNCITRAL, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement May 1, 2020), art. 5 ("1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters. 2. Disclosures made pursuant to paragraph (1) shall include the following: (a) Any professional, business and other significant relationships, within the past [five] years with: (i) The parties [and any subsidiaries, parent-companies or agencies related to the parties]; (ii) The parties' counsel; (iii) Any present or past adjudicators or experts in the proceeding; (iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding]; …").

9 EU-Singapore Investment Protection Agreement (signed October 19, 2018, not in force), art. 3.8 ("1. Any disputing party benefiting from third party funding shall notify the other disputing party and the Tribunal of the name and address of the third party funder. 2. Such notification shall be made at the time of submission of a claim, or without delay as soon as the third party funding is agreed, donated or granted, as applicable.").

10 EU-Vietnam Investment Protection Agreement (signed June 30, 2019), art. 3.37 ("1. In case of third-party funding, the disputing party benefiting from it shall notify the other disputing party and the division of the Tribunal, or where the division of the Tribunal is not established, the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder. 2. Such notification shall be made at the time of submission of a claim, or, when the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made. 3. When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected.").

a positive initiative in that regard.[11] Yet, the predatory practices of some funders that have recently come to light have not done justice to the wider industry. Many thus still question whether self-regulation is sufficient to guarantee a principled and ethical engagement by third-party funders with the dispute resolution community. It is only natural, therefore, that third-party funding has attracted the attention of regulators and dispute resolution bodies. As explored in the articles in this issue, there is simultaneous movement towards both liberalization and regulation, as is evident from recent legislation and regulations in Hong Kong, Singapore, and France.[12]

For third-party funders, the prospect of increasing regulation is unavoidable. This is far from fatal, however. Greater scrutiny is testament to the successful popularization of third-party funding. The changes, challenges, and competition brought by the pressures of enhanced transparency, scrutiny, and regulation are akin to a process of natural selection – funders who adapt will survive and thrive.

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[11] Association of Litigation Funders, Code of Conduct for Litigation Funders (January 2018), https://associationoflitigationfunders.com/documents/ (last accessed November 3, 2020).

[12] *See* the articles of Kim M. Rooney, Michael Hwang SC and Yin Wai Chan, and Jalal El Ahdab, respectively.