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International Arbitration Experts Discuss The ICSID Arbitration Rules And The Disclosure Of Third-Party Funders Information

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Commentary

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules on disclosure for arbitrators. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Jonathan Morton, Counsel, Haynes & Boone, London
- Andreas Dracoulis, Partner, Haynes & Boone, London
- Omer Er, Partner, Michelman & Robinson, LLP, New York
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Mealey's: The ICSID Arbitration Rules, as updated in 2022, require disclosure of the name and address of third-party funders. What is your opinion on this rule change? Does it adequately address concerns that some third-party funders may have engaged in abuse of the arbitral process?

Morton and Dracoulis: Third-party funding, and the potential abuses that may occur where it remains cloaked in the shadows, has been discussed a great deal over the last few years. But a balance needs to be struck between disclosure and fairness. Litigation is notoriously expensive, and, for some, third party funding is the only method by which they can get access to justice. Such funding is not, however, just used by impecunious parties, but also by larger, more established entities that wish to simply stabilize their cash-flow. There is a danger of misuse in all such arrangements, primarily as funders may seek to direct the case in a manner which serves to maximize their return, which could negatively impact a party's ability to manage its case. There is also a risk of connection between arbitrators and funders, and attendant risk of bias, which could result in issues with enforcement.

The updates to the ICSID Arbitration Rules have sought to minimize the risk of such abuse by requiring written disclosure of the identity of any third-party funders. However, how to accurately define exactly what amounts to such a funder remains a challenge. The Rules have set out a comprehensive definition, widely drafted, and include a requirement to provide details of any ultimate beneficial ownership of the funder. While this does place considerable obligations on those funders, in our view this is necessary to mitigate the risk of shell companies being used to hide the real investors.

The Rules also allow Tribunals to request further information on the content of any such funding arrangement. While welcome in principle, there is a danger that where arrangements contain information about the case, particularly any areas of concern, this could unfairly prejudice the Tribunal. Redaction of such information should, therefore, be permitted. The discretionary nature of this power is something which will hopefully allow Tribunals to take a reasonable and proportionate approach, consistent with the interests of justice.

From an English law and commercial arbitration perspective, it is notable that neither the upcoming amendments to the Arbitration Act, nor the rules of regularly used bodies such as the LCIA require

disclosure of funding. However, both the ICC rules and the (non-binding) IBA Guidelines on Conflicts of Interests do. It may therefore be that, in respect of English law seated commercial arbitrations, Tribunals will increasingly expect such disclosure, at least of the existence of such funding, even where the relevant rules do not expressly require it.

Er: The 2022 amendment to the ICSID Arbitration Rules, mandating the disclosure of third-party funders, represents a commendable effort to bolster transparency in international investment arbitration. Nevertheless, the rule's effectiveness in addressing the complexities of third-party funding, particularly regarding potential abuses, invites further scrutiny.

One key area of concern lies in its potential impact on access to justice. The mandatory disclosure of funder identities could inadvertently deter some funders from backing meritorious claims, particularly if they perceive these disclosure requirements as unduly invasive. This raises the risk of limiting arbitration access for parties in genuine need of financial support—an issue frequently encountered in practice. The challenge for practitioners lies in balancing this unintended consequence with the overarching goal of ensuring transparency in arbitral proceedings.

Furthermore, while the rule advances transparency by mitigating conflicts of interest, its scope may be too narrowly drawn. Requiring only the names and addresses of funders does not necessarily offer a complete view of the funders' involvement. The absence of more granular information regarding funding agreements and the degree of influence funders may exert over strategic decisions or settlement negotiations leaves tribunals and parties without sufficient insight to fully assess the implications of third-party funding.

The risk of abuse remains another concern. Although the disclosure rule may act as a deterrent against speculative claims and excessive control by funders, it is overly optimistic to assume it will entirely mitigate such risks given its current limitations. The rule, as it stands, stops short of the comprehensive oversight needed to address the more nuanced aspects of third-party funding practices.

Enforcement also poses a significant challenge. The success of this rule hinges on rigorous enforcement. Without vigilant oversight, there is a real risk that sophisticated structuring of funding arrangements could circumvent the disclosure requirements. This underscores the need for continuous monitoring and potential future refinements to the regulatory framework.

From my perspective, a more robust framework would not only mandate the disclosure of funders' identities but also require the disclosure of key terms within the funding agreements. Further, establishing comprehensive guidelines around acceptable funding practices, coupled with enforcement mechanisms to sanction misconduct, would significantly enhance the integrity of the arbitration process.

In sum, while the 2022 ICSID rule change represents meaningful progress, it should be viewed as one component of a broader, evolving effort to regulate third-party funding. As practitioners and stakeholders within the arbitration community, it is incumbent upon us to remain engaged in this dialogue, continuously assessing the efficacy of these rules and advocating for necessary improvements. Only through sustained engagement and vigilance can we harness the benefits of third-party funding while effectively managing its potential pitfalls.

Crncevic and Haden: The 2022 ICSID Arbitration Rules update requiring disclosure of third-party funders interested in the arbitration is a positive development.

Arbitration stakeholders—including parties, arbitrators and practitioners—depend on the procedural safeguards contained in arbitral rules to trust that the results of any arbitral process are based on fair and neutral considerations, independent of partiality or conflicts of interest. Those considerations are, perhaps, even more essential in investor-State arbitrations, where an analysis of conflicts of interest is often more complex and expansive in light of the sovereign interests implicated in such disputes.

Accordingly, the ICSID Rules update imposes a reasonable expansion on disclosure obligations to alert the stakeholders in an arbitration to potential conflicts of interest. Like parties and any ultimate beneficial owners and corporate parent entities, funders to an ICSID arbitration have a pecuniary interest in

the outcome of that arbitration, and the participants in that arbitration have a right to know of all such interested parties—and a corresponding obligation to ensure that there are no conflicts of interest with respect to those interested parties. This more expansive disclosure requirement ensures a more fair and impartial arbitral process through a more robust conflict-of-interest assessment, and by extension, a resulting ruling in which the parties can be confident. However, it is difficult to view the ICSID Rules update as one designed to address any purported abuse of the arbitral process by funders. For example, the new rule on funder disclosure does not curb the pursuit of meritless claims or unnecessary litigiousness, to the extent that funder involvement raises the specter of such behavior.

Indeed, safeguards already exist to prevent improper use of the arbitral process by any stakeholder. Counsel are typically subject to ethical rules in their jurisdictions that govern attorney conduct when representing clients in legal proceedings. For example, in the United States, ethical rules prevent attorneys from committing acts prejudicial to the administration of justice and impose a duty of candor toward a tribunal. These ethical obligations may be logically extrapolated to preclude any ostensible abuse of process when dealing with funders in an arbitration. Moreover, the ICSID rules reinforce good-faith behavior by parties and impose cost-shifting for violations of that principle.

Consequently, the 2022 ICSID Rules update is a welcome development in support of transparency and guarding against conflict-of-interest issues by considering the role of funders, but that update does not inherently address abuse of process concerns. ■

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