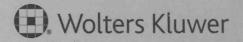


JONAS VON GOELER



Third-Party Funding in International Arbitration and Its Impact on Procedure

Jonas von Goeler



Published by: Kluwer Law International B.V. PO Box 316 2400 AH Alphen aan den Rijn The Netherlands

Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by: Wolters Kluwer Legal & Regulatory U.S. 7201 McKinney Circle Frederick, MD 21704 United States of America Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by: Turpin Distribution Services Ltd Stratton Business Park Pegasus Drive, Biggleswade Bedfordshire SG18 8TQ United Kingdom Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-5015-8

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Printed in the United Kingdom.

Foreword

I first met Dr Jonas von Goeler at the Annual Meeting of the ICC Institute of World Business Law. On that occasion, a number of years ago now, the topic was precisely dedicated to Third-Party Funding in International Arbitration. We had the opportunity to exchange opinions and Dr von Goeler mentioned that thanks to that Paris symposium he had decided to devote the next few months to research and to writing his doctoral thesis on those same issues that had sparked such lively debate.

After having now completed his thorough and uniquely insightful research, Dr von Goeler has given me the privilege of reading the text of his forthcoming book 'Third-Party Funding in International Arbitration and Its Impact on Procedure'. Perhaps it is because he recalls our conversation within the framework of the International Chamber of Commerce that he has asked me to write a few lines by way of prologue to his imminent publication.

I have read this work with great interest and admiration. It is a conscientiously methodical work that tackles the main problems in Third-Party Funding, and provides a deeper understanding and analysis of the many issues and sub-issues that continue to emerge as the use of Third-Party Funding steadily increases. At the time of the symposium in Paris, we were speaking of a complete novelty in international arbitration. In fact, I remember that when I first approached the ICC Institute Council with the idea that we could dedicate our symposium to the subject, I was met with a lot of reticence from people on the Board with years of experience in arbitration. The passage of time has since demonstrated how right we were to focus our discussions on this matter. Today, Third-Party Funding in international arbitration has become an extremely important topic in our field.

The first problem that Dr von Goeler successfully broaches is what exactly we understand by the term Third-Party Funding, and what in the US is named Alternative Litigation Finance. There are many forms of Third-Party Funding, from the pure financing of the litigant in its various guises to the actual financial transfer of the claim. We cannot, then, talk about one whole concept, but rather examine the issues on a case by case basis and draw conclusions therefrom. This is the underlying theme in this work.

The crux of the matter is that we are talking about financing the claimant or the respondent in return for a percentage of the outcome specified in the arbitral award. Accordingly, if there is a negative result the third party funder runs the risk of losing the money invested. If the outcome is positive, the third party funder is compensated with a percentage of the figure as established in the financing agreement. Logically, the idea of compensation that depends solely on the outcome of arbitral proceedings has been highly questioned in our recent history of procedural law. Indeed, not long before now, an attorney who fixed his fees depending on the outcome of his intervention was in grave violation of the code of professional ethics. The practice of international continental law has changed so much in a relatively short space of time, abolishing in practice, or obsoleting, the so-called pactum de quota litis, or what is known as champerty, maintenance, and barratry in Anglo-Saxon law. A law professional cannot now be tarnished by having anything to do with the financial outcome of the proceedings. The tide has gradually turned. Attorneys can now receive remuneration by way of a success fee. This has also paved the way for more innovative methods of Third-Party Funding, where remuneration likewise is determined by the outcome.

International arbitration has long ceased to be an artisan instrument for the settlement of disputes. It has become an industry in its own right with all its concomitant parallel activities. One of these is the possibility of obtaining Third-Party Funding. For a jurist of the old school the very thought that a claim could be financially considered an asset would be deemed outrageous. The turnaround is that today, the third-party funder invests precisely in these financial assets.

The third-party funder must carry out the necessary due diligence before making its decision. It must assess the litigation, its amount, jurisdictional impediments, each party's defence, the nature and duration of the proceedings, the possibilities of reaching an agreement, the solvency of the other party that may allow the arbitral award to be enforced, the quality of the attorneys taking part, and the manner in which they are compensated.

Third-Party Funding in international arbitration has both its advocates and its opponents. The former argue that it enables access to justice. International arbitration is expensive and not everyone can afford to use it. Jeremy Bentham quite rightly said that '[w]ealth has indeed the monopoly of Justice against poverty'. Detractors, however, uphold that financing lends itself to a certain professional frivolity in the attorneys whose compensation is guaranteed by the financing. One can embark further on this type of discussion but unquestionably Third-Party Funding today is a reality and is increasingly visible in the world of international arbitration.

Naturally, Third-Party Funding does not leave the traditional players in the world of arbitration indifferent. Particularly prevalent in the discourse is the attorney-client relationship. Who is the attorney's real client? Who gives the instructions and who finances the proceedings? The intervention of third parties calls into question the matter of confidentiality and whether the existence of such financing should be communicated to the tribunal or the other party.

Logically, the third-party funder not only ensures whether or not financing is granted but also holds control over the very proceedings. The outcome is dependent on whether the proceedings are handled competently or ineptly, or whether or not the

right decisions are made in procedural strategy. Evidently, all of these factors have their limitations which Dr von Goeler diligently presents and analyses throughout these interesting pages.

The financing of investment protection arbitrations presents its own set of dilemmas and conundrums. The fact that one of the parties is a sovereign State carries special demands, particularly with regard to transparency. If the arbitration is based on a public offer to submit to arbitration based on the provisions of an investment protection treaty, logically the source of financing may have an impact, even jurisdictionally, on the arbitral proceedings.

Our generation has seen first-hand the development of international arbitration; first commercial, and more recently investment protection arbitration. The most significant impact recently has been the creation of what we may consider as a new international economic legal system. The multiple arbitral awards have created a true international common law since, on the basis of international treaties consistent jurisprudence has emerged that, without a doubt, can be considered a true *opinio juris*. One of the links in this consolidation of international arbitration consists precisely of the financing of arbitrations, large-scale and small-scale alike. And here I come to the interest of this book which contains a considered reflection on this phenomenon which, though only recent, has already been given credit for the importance that it has assumed in the practical life of international arbitration.

Bernardo M. Cremades October 2015 Madrid, Spain

Preface

On 25 November 2015, this work has been accepted as a doctoral dissertation at the Faculty of Law of the University of Mannheim. It was written during my time as a research and teaching assistant at the Chair for Private Law, International Corporate and Financial Market Law and European Business Law between November 2012 and February 2015. I thank the chairholder, my supervisor Professor Dr Ulrich G. Schroeter, for his invaluable advice and mentorship throughout the process. Without his encouragement to attend the ICC Conference on Third-Party Funding in International Arbitration in November 2012, this work might not have come into existence. I would also like to thank Professor Dr Mary-Rose McGuire for providing the second opinion on the dissertation.

Third-party funding in international arbitration, a phenomenon I first overheard at a university cafeteria in 2011, has become one of the most discussed topics within the international arbitration community. I feel privileged for having been able to devote my research to a subject that could hardly have been more exciting and challenging, at a time when new articles, cases, and developments are appearing on a weekly basis.

I hope that this book will serve as a useful guide on how to solve some of the most important issues raised by third-party funding in international arbitration, and may contribute to the demystification of the subject. That being said, there can be no doubt that the evolution of both third-party funding and international arbitration will bring new challenges for us to tackle.

This work has benefited from the support of several arbitration specialists, litigation funders and friends, among them Stavros Brekoulakis, Bernardo M. Cremades, Nazima Fayzibaeva, Matei Foit, Aren Goldsmith, Duarte Henriques, Martin Jarrett, Carla Kasper, Tassilo Keiber, Maria Krämer, Laurent Lévy, Dan Li, Sophie Nappert, Max Oehm, Wiam Ouertani, Leslie Perrin, Jan Prügel, Matthias Rüping, Sebastian Seidel, Victoria Schunder, Mick Smith, Peter Smith, Christian Stuerwald, Lea Tochtermann, Sherlin Tung, and Mark Wells, to whom I am greatly indebted.

Last but not least, I am grateful to Eleanor Taylor, my editor at Kluwer Law International, for her steadfast support and patience.

This work is based on the state of the law, jurisprudence, and literature as of September 2015. The views expressed in this work reflect my own personal perspectives, and are not attributable to the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.

Jonas von Goeler October 2015 Düsseldorf, Germany

List of Abbreviations

AAA American Arbitration Association

American Bar Association ABA

ACICA Australian Centre for International Commercial Arbi-

tration

ACICA Expedited Expedited rules of arbitration of the Australian Centre Arbitration Rules

for International Commercial Arbitration, 1 August

2011 edition

ACICA Arbitration Rules incorporating the Emergency ACICA Rules

Arbitrator Provisions, 1 August 2011 edition

ALF The Association of Litigation Funders of England and

Wales

ALF Code ALF Code of Conduct for Litigation Funders, January

2014 edition

ALI American Law Institute

All ER All England Law Reports (United Kingdom) Am. Bus. L.J. American Business Law Journal (United States)

Am. J. Comp. L. American Journal of Comparative Law (United States) Am. Rev. Int'l Arb. American Review of International Arbitration (United

States)

AnwB1 Anwaltsblatt (Germany)

Arb. Int'l Arbitration International (United Kingdom)

Arbitration Arbitration, the international journal of arbitration,

mediation and dispute management (United Kingdom)

Article Art. Arts Articles ASA Bull. Association Suisse de l'Arbitrage Bulletin (Switzer-

land)

Asian Int'l Arb. J. Asian International Arbitration Journal (The Nether-

lands)

AUD Australian Dollar

Austrian YB Int'l Arb. Austrian Yearbook on International Arbitration (Aus-

tria)

b-Arbitra Belgian Review of Arbitration

BCSC Supreme Court of British Columbia (Canada)
BeckRS Beck-Rechtsprechung, beck-online database (Ger-

many)

BIT(s) Bilateral Investment Treaty (Treaties)

Bull. civ. Bulletin des arrêts de la Cour de cassation: Chambres

civiles (France)

BVerfGE Entscheidungen des Bundesverfassungsgerichts (Ger-

many)

Cah. Arb. Les Cahiers de l'Arbitrage/The Paris Journal of Inter-

national Arbitration (France)

Cal. L. Rev. California Law Review (United States)

Can. Bus. L.J. Canadian Business Law Journal (Canada)

CanLII Canadian Legal Information Institute (Canada)

Cardozo J. Int'l & Comp. L. Cardozo Journal of International and Comparative

Law (United States)

Cardozo L. Rev. Cardozo Law Review (United States)
CAS Court of Arbitration for Sport (Lausanne)

CAS Rules CAS Procedural Rules for Arbitration, 1 March 2013

edition

CCBE Council of Bars and Law Societies of Europe

CCBE Code Code of Conduct for European Lawyers, adopted 28

October 1988, last amended 19 May 2006

CDR Commercial Dispute Resolution (United Kingdom)
CDT Cuadernos de Derecho Transnacional (Spain)

CEO Chief Executive Officer

CEPANI The Belgian Centre for Arbitration and Mediation
CEPANI Rules CEPANI Arbitration Rules, January 2013 edition
CIArb Chartered Institute of Arbitrators (United Kingdom)
CIETAC China International Economic and Trade Arbitration

Commission

CIETAC Rules CIETAC Arbitration Rules, 1 May 2012 edition

Cir. Circuit (United States Federal)

CISG United Nations Convention on Contracts for the Inter-

national Sale of Goods of 11 April 1980

CLR Commonwealth Law Reports

Col. J. L. & Soc. Probs. Columbia Journal of Law and Social Problems (United

States)

Col. L. Rev. Columbia Law Review (United States)

Consumer Fin. L.Q. Rep. Consumer Finance Law Quarterly Report (United

States)

CPR International Institute for Conflict Prevention & Reso-

lution

DePaul L. Rev. DePaul Law Review (United States)

DIS Deutsche Institution für Schiedsgerichtsbarkeit/

German Institution of Arbitration

DIS Rules DIS Arbitration Rules, 1 July 1998 edition

Disp. Res. Int'l Dispute Resolution International (United States)

Disp. Res. J. Dispute Resolution Journal (United States)

e.g. exempli gratia (for example)

ed. editor
edn edition
eds editors

et al. et alii (and others)
etc. et cetera (and so forth)

EU European Union

EUR Euro

Euro, Law. European Lawyer (United Kingdom)

EWCA Civ. Court of Appeal, Civil Division (United Kingdom)

EWHC High Court of England and Wales F. Supp. Federal Supplement (United States)

F. Supp.2d Federal Supplement 2nd series (United States) F.2d, F.3d Federal Reporter 2nd, 3rd series (United States)

F.R.D. Federal Rules Decisions (United States)
FCA Federal Court of Australia (Australia)

fn. footnote

Fordham Int'l L.J. Fordham International Law Journal (United States)

Fordham L. Rev. Fordham Law Review (United States)

GBP United Kingdom Pound

Geo. J. Legal Ethics Georgetown Journal of Legal Ethics (United States)

List of Abbreviations

Georgetown Law Journal (United States) Geo. L. I. Global Arb. Rev. Global Arbitration Review (United Kingdom)

HCA High Court of Australia HKC Hong Kong Cases

HKCU Hong Kong Unreported Judgements HKFI Court of First Instance (Hong Kong)

HKIAC Hong Kong International Arbitration Centre

HKIAC Rules Hong Kong International Arbitration Centre Adminis-

tered Arbitration Rules, 1 November 2013 edition

HKLRD. The Authorized Hong Kong Law Reports and Digest Handelskammer Zürich/Zurich Chamber of Com-HKZ.

merce

i.e. id est (that is)

I.L.M. International Legal Materials (United States)

IA Reporter Investment Arbitration Reporter International Bar Association IBA

IBA Guidelines on Conflicts of Interest in International IBA Guidelines 2004

Arbitration, adopted 22 May 2004

IBA Guidelines 2014 IBA Guidelines on Conflicts of Interest in International

Arbitration, adopted 23 October 2014

IBA Rules on Evidence IBA Rules on the Taking of Evidence in International

Arbitration, adopted 29 May 2010

ibid. ibidem (in the same place)

ICC International Chamber of Commerce

ICC International Court of Arbitration Bulletin ICC Bull. ICC Rules ICC Rules of Arbitration, 1 January 2012 edition **ICCA** International Council for Commercial Arbitration ICDR International Centre for Dispute Resolution

ICDR International Dispute Resolution Procedures, 1 ICDR Rules

June 2009 edition, International Arbitration Rules

ICI International Court of Justice (The Hague)

International Centre for the Settlement of Investment ICSID

Disputes (Washington)

ICSID Convention Convention on the Settlement of Investment Disputes

between States and Nationals of Other States, signed

18 March 1965

ICSID Review - Foreign Investment Law Journal ICSID Rev.

(United Kingdom)

ICSID Rules of Procedure for Arbitration Proceedings,

10 April 2006 edition

id. idem (the same)

IFRS International Financial Reporting Standard

Indiana L.J. Indiana Law Journal (United States)

Int'l & Comp. L. Q. International and Comparative Law Quarterly (United

Kingdom)

Int'l Law Practicum (United States)

inter alia among other things

Iowa L. Rev. Iowa Law Review (United States)

Iran-US CTR Iran-United States Claims Tribunal Reports

J. CIArb's Arbitration: the Journal of the Chartered Institute of

Arbitrators (United Kingdom)

J. du Droit Int'l Journal du Droit International (France)

J. Int'l Arb.

Journal of International Arbitration (The Netherlands)

J. L. Econ. & Pol'y

Journal of Law, Economics & Policy (United States)

J. of Empirical Legal Stud
Journal of Empirical Legal Studies (United States)

ies

J.W.I. The Journal of World Investment (Switzerland)
J.W.I.T. The Journal of World Investment and Trade (The

Netherlands)

JAMS JAMS, the Resolution Experts (formerly known as Ju-

dicial Arbitration Mediation Services)

JAMS Rules JAMS Comprehensive Arbitration Rules & Procedures,

1 October 2010 edition

Kan. L. Rev. The University of Kansas Law Review (United States)

LCIA Rules LCIA Rules, 1 October 2014 edition

LEXIS LexisNexis database

Lloyd's Rep Lloyd's Law Reports (United Kingdom)

Mich. J. Int'l L. Michigan Journal of International Law (United States)

Minn. L. Rev. Minnesota Law Review (United States)

N.Y.2d New York Reports 2nd series (United States)

NAI Nederlands Arbitrage Instituut/Netherlands Arbitra-

tion Institute

NAMIC National Association of Mutual Insurance Companies

(United States)

NBR (2d) New Brunswick Reports 2nd series (Canada)

New York Convention Convention on the Recognition and Enforcement of

Foreign Arbitral Awards, signed 10 June 1958

NJW Neue Juristische Wochenschrift (Germany)

NJW-RR Neue Juristische Wochenschrift-Rechtsprechungs-

Report (Germany)

no./No. number/Number nos/Nos numbers/Numbers

Notre Dame L. Rev. Notre Dame Law Review (United States)

NZCA Court of Appeals of New Zealand

NZLR New Zealand Law Reports
NZSC Supreme Court of New Zealand

OECD Organisation for Economic Co-operation and Develop-

ment

OGEMID Oil Gas Energy Mining Infrastructure Dispute Manage-

ment (The Netherlands)

Ohio St.3d Ohio State Reports, 3rd series (United States)
ONSC Ontario Superior Court of Justice (Canada)

para. paragraph paras paragraphs

PCA Permanent Court of Arbitration (The Hague)

Penn. J. Bus. L. University of Pennsylvania Journal of Business Law

(United States)

Pepp. Disp. Res. L.J. Pepperdine Dispute Resolution Law Journal (United

States)

PLC Practical Law Company (United Kingdom)

PwC PricewaterhouseCoopers

QMUL Queen Mary University of London Rev. Arb. Revue de l'Arbitrage (France)

Rev. Dr. Aff. Int. Revue de Droit des Affaires Internationales/

International Business Law Journal (United Kingdom)

s(s) sections s. section

S.E.2d South Eastern Reporter 2nd series (United States)

SCC Stockholm Chamber of Commerce

SCC Rules Arbitration Rules of the Arbitration Institute of the

Stockholm Chamber of Commerce, 1 January 2010

edition

SchiedsVZ Zeitschrift für Schiedsverfahren/German Arbitration

Journal (Germany)

SEC United States Securities and Exchange Commission Sec. Reg. L.J. Securities Regulation Law Journal (United States)

SGCA Singapore Court of Appeal (unreported judgments)

SIAC Singapore International Arbitration Centre

SIAC Rules Arbitration Rules of the Singapore International Arbi-

tration Centre, 1 April 2013 edition

So. 2d, 3d Southern Reporter 2nd, 3rd series (United States)

Spain Arb. Rev. Spain Arbitration Review/Revista del Club Español del

Arbitraje (The Netherlands)

St. Louis U. L.J. Saint Louis University Law Journal (United States)
StudZR Studentische Zeitschrift für Rechtswissenschaft

Heidelberg/Heidelberg Student Law Review (Ger-

many)

Swiss Rules Swiss Rules of International Arbitration, June 2012

edition

Syracuse L. Rev. Syracuse Law Review (United States)

TDM Transnational Dispute Management

U. Chi. L. Rev. The University of Chicago Law Review (United States)U.C. Davis Bus. L.J. U.C. Davis Business Law Journal (United States)

U.S. United States Reports

UCLA L. Rev. University of California Law Review (United States)

UKHL United Kingdom House of Lords

UKPC Privy Council

UNCITRAL United Nations Commission on International Trade

Law

UNCITRAL Model Law on International Commercial

Arbitration, adopted 21 June 1985, with amendments

as adopted in 2006

UNCITRAL Rules UNCITRAL Arbitration Rules, adopted 15 December

1976, as revised in 2010

UNCITRAL Transparency UNCITRAL Rules on Transparency in Treaty-based

Rules Investor-State Arbitration, effective 1 April 2014
UNCTAD United Nations Conference on Trade and Develop-

ment

UNIDROIT International Institute for the Unification of Private

Law

USD United States Dollar

Va. J. Int'l L. Virginia Journal of International Law (United States)

Vand, L. Rev. Vanderbilt Law Review (United States)

List of Abbreviations

VCLT Vienna Convention on the Law of Treaties, signed 23

May 1969

VIAC Vienna International Arbitral Centre

Wake Forest L. Rev. Wake Forest Law Review (United States)

Wash U. L. Rev. Washington University Law Review (United States)
WIPO World Intellectual Property Organization (Geneva)

WIPO Rules WIPO Arbitration Rules, 1 June 2014 edition

WL Westlaw database

WLR Weekly Law Reports (United Kingdom)

Wm & Mary Bill Rts. J. William & Mary Bill of Rights Journal (United States)

Wm & Mary L. Rev. William & Mary Law Review (United States)

YB Comm. Arb. Yearbook Commercial Arbitration

YB Int'l I. L. & P. Yearbook on International Investment Law & Policy

(United States)

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